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PRIVATIZATION OF CORRECTIONS

ORIGINAL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST AND SECOND SESSIONS

ON

PRIVATIZATION OF CORRECTIONS

NOVEMBER 13, 1985, AND MARCH 18, 1986

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PRIVATIZATION OF CORRECTIONS

WEDNESDAY, NOVEMBER 13, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Mazzoli, Moorhead, Swindall, and Coble.

Staff present: Michael J. Remington, chief counsel; Gail Higgins Fogarty, counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, majority clerk.

Mr. KASTENMEIER. The committee will come to order.

Without objection, if the permission has not already been obtained, I ask unanimous consent that the subcommittee permit the meeting to be covered in whole or in part by television or radio broadcast and/or still photograph pursuant to the rules.

I thank my colleague, the gentleman from Kentucky, Mr. Mazzoli, for being here and agreeing to chair the committee in my absence while I was over at the Senate a bit earlier.

Today the subcommittee will conduct an oversight hearing on the subject of privatization of corrections. The main purposes of the hearing will be to, first, review recent developments on the subject; second, to examine the advantages and disadvantages of privatization and related legal, financial, administrative, and public policy questions; third, to explore what, if any, action the Federal Government should take in the area; and, fourth, to raise further questions about it, if appropriate.

Privatization is a term applied to a practice in which the traditional public or governmental functions are delegated to the private sector for performance. In the field of corrections there has been a history of involvement of the private sector in owning and managing halfway houses, pre-release residential programs, in operating juvenile facilities. contracting with correctional agencies for food services, health care, educational, vocational, and counseling services.

However, the concept of ownership and management of a primary adult correctional facility is relatively new. Federal, State and local correctional agencies now incarcerate over 460,000 prison inmates and have over 200,000 persons awaiting trial or serving time in jail. The prison population has increased over 40 percent from 1980 until the end of 1984, and it has been estimated that the State prison population is 10 percent over capacity while the Federal prison population is 25 percent over capacity.

The courts are rightfully demanding that existing prison and jail systems conform to the constitutional standards. At the same time there is a need to develop creative ways to improve the situation, including improved classification procedures and comprehensive criminal justice planning.

Some persons are recommending privatization of corrections as a possible way of increasing bed space for those who must be incarcerated. Privatization of corrections covers construction financing as well as the operation and management of a correctional facility. In the area of construction financing the Federal Government as well as the States will need to make decisions about possible tax incentives and benefits to the private sector.

The question of possible legislation relating to the private sector operation and management of a primary adult correctional facility will remain primarily with State legislators and county governments. However, the Federal Government must also examine the subject.

The Federal Government has moved cautiously in the area and in 1984 the Federal Bureau of Prisons contracted for 3 years with the private sector facility in La Honda, CA, to detain 60 youth correction offenders on low security needs. The Bureau of Prisons is carefully monitoring the facility which the Attorney General has designated as an appropriate facility under a provision of the United States Code. In addition, approximately 60 to 90 Bureau of Prisons inmates who are aliens awaiting deportation are housed in a 350-bed Houston facility which is under an INS contract to the Corrections Corporation of America. However, the BOP director has indicated that the Bureau of Prisons would not have authority to contract out its regular prisons to the private sector.

The concept of privatization is a complex one. Among the questions I think which need to be asked are: Can the private sector do the job better and more efficiently? Can the privatization result in cost savings to the Government and to the taxpayer? Would prison and jail inmates have improved conditions through privatization or would they be more likely to be subject to abuse? Would the inmates be given less rights? Can private institutions deal with the new generation of violence-prone inmates? And the ultimate question: Can and should governments delegate this power to deprive persons of liberty?

Before I welcome our witnesses, I would like to place in the record statements of the National Prison Project of the ACLU, the American Federation of Government Employees Council of Local Prison Locals, and the American Federation of State, County and Municipal Employees.

[The statements of the National Prison Project, the American Federation of Government Employees Council of Prison Locals, and the American Federation of State, County and Municipal Employees follow:]

Statement Of

EDWARD I. KOREN

Staff Attorney with

The ACLU's National Prison Project

Before the House Judiciary Sub-Committee on
Courts, Civil Liberties and the
Adminstration of Justice

Concerning
the Privatization of Prisons and Jails

November 13, 1985

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I am pleased to present this statement to the Subcommittee, in order to comment on the growing movement toward and controversy concerning privatization of prisons and jails - the taking over of the management and operation of public facilities by for-profit entities.

Since 1972 the American Civil Liberties Union's National Prison Project since 1972 has sought to strengthen and protect the civil and constitutional rights of adult and juvenile prisoners, to improve conditions in the nation's prisons and jails, and to develop rational, less costly and more humane alternatives to traditional incarceration.

In furtherance of these activities, the Project's staff attorneys and other staff members are engaged in the representation of prisoners incarcerated in penal institutions throughout the country. The Project has been and is presently involved in many important cases concerning the rights of prisoners. In addition, the Project's staff has been consulted by correctional officials and legislative committees in various states. With respect to privatization I personally have appeared and participated in conferences sponsored by the National Institute of Justice of the Department of Justice, and the National Conference of State Legislatures.*

The position of the American Civil Liberties Union with respect to the privatization of correctional facilities will

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* NIJ's conference was held in Arlington, Virginia in February, 1985 and the National Conference of State Legislatures was held in San Francisco in September of this year.

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probably* focus on the rights of prisoners and the obligations of their keepers under the law. Prisoners confined to facilities operated by private entities or persons, according to the proposed policy, must retain the same rights, privileges, and remedies that prisoners possess now in government-run institutions. This is where we draw the line. In other words prisoners must not be placed in any worse situation in terms of their treatement, care, and legal status than those prisoners confined in public institutions.

The ACLU probably will not take a position with respect to the public policy aspects of privatization - whether privatization is a good or bad way to go from a political, economic or social point of view; whether privatization will be more effective or efficient in carrying out the goals of the correctional or criminal justice system; or whether it makes a difference that the correctional goals of deterrence, punishment, incapacitation, rehabilitation are carried out by private entities or by government. There is considerable debate on these questions in the civil liberties community and elsewhere - witness the two major conferences on this issue just this year** as well as the split between the American Correctional Association and the National Sheriffs Association. More about these issues later.

Nor is it likely that the Civil Liberties Union will take a

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* ACLU policy is established by the ACLU's Executive Board. The Steering Committee of the National Prison Project has been designated by the Board to come up with a recommended ACLU policy on this subject. This Committee has begun its deliberations and plans to submit its report in the near future.

** See footnote from p.1 above.

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position on the narrow question of whether the state or its subdivisions can delegate its authority to confine persons to private persons or entities. From the civil liberties perspective it is irrelevant whether the correctional officer carrying a truncheon on the tier is wearing a badge with a star or a badge with a dollar sign.

On the other hand we do see civil liberties implications in the situation where private entities or persons can affect or impact the length or duration of confinement of a prisoner. Plainly it is in the interest of private entrepreneurs to increase the number of prisoners in facilities because they are paid by the head. By our lights any decision which impacts these numbers must be made by government officials with no ties to a private contractor. A concrete example is in the disciplinary realm where jail or prison officials are empowered to take away good time or file adverse disciplinary reports which will in turn affect parole release.*

What is critical is the necessity to hold those persons designated by society to carry out or enforce government policies, responsible in a court of law for their misconduct or their failure to carry out their obligations under the law. This

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* The Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 563-71, 94 S.Ct. 2963 (1974) held that prisoners accused of violations of prison rules will be provided a procedurally fair hearing before discipline can be meted out or good-time taken away. The Court assumed that prisoners are provided with an impartial tribunal. One lower federal court has held that a tribunal is not impartial if the hearing officer or committee member was involved in the incident that the hearing is about. *Edwards v. White*, 501 F.Supp. 8 (M.D. Pa. 1979). Also see generally *Powell v. Ward*, 487 F.Supp. 917, 931 (S.D. N.Y. 1980) *aff'd as mod*. 643 F.2d 924 (2d Cir. 1981) *cert*. *den*. 454 U.S. 832 (1981).

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Subcommittee is certainly aware of the long hard struggle waged over the last 20 years to impose a modicum of accountability upon local and state correctional authorities. Lord only knows we have a long way to go on this score. But currently it is well-settled under our law that jail and prison officials can be brought into court and forced to justify their policies and practices as they relate to their treatment of prisoners.* Under both federal and state law, prison officials can be sued and, incident to these lawsuits they can be questioned and liability can attach depending on a judge or jury's reaction to their answers. Injunctive relief and money damages can result from such findings of liability. As a result an impressive body of law has been established which sets out minimum constitutional standards for the treatment and care of confined populations and these standards are enforceable in a court of law. We are justifiably proud of these achievements, of these protections for those who find themselves among an isolated, despised and forgotten minority.

Our fears about privatization stem from the perception that we do not have yet in place a mechanism that makes private authorities or their agents responsible for their actions in the same way that government authorities can be held accountable under current law.

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* Cf. Wolff v. McDonnell 418 U.S. at 556-7 ("...a prisoner is not wholly stripped of constitutional protection when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."); and Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct 2392 (1981) (federal courts remain open for litigating violations of prisoners' constitutional rights.)

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Title 42 U.S.C. §1983 is the basic, jurisdictional statute that civil rights and civil liberties lawyers utilize to sue for violations of federal constitutional rights which is contained essentially in the first ten Amendments of the Constitution known as the Bill of Rights. What the statute essentially says is that if you can show that a person has deprived another of his constitutionally protected rights and that the person has acted "under color of state law" he or she is liable. This "color or state law" language is referred to as the state action requirement. What it means is that the deprivation of rights must be caused by a person that wears the mantle or the cloak of state authority when he or she took the action which is alleged to be a deprivation.*

We take the position that there is every reason to believe that we could hold private authorities accountable under §1983 as we understand the law today. Moreover, we are ready, willing and able to continue our litigation program against private as well as government entities and staff. We are confident because of our reading of Supreme Court and other precedent on this subject.**

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* Further, it has been held that municipal or county officials are state actors for the purpose of §1983 lawsuits. Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978).

** See for example Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982) (private juvenile training school subject to §1983); Ancata v. Prison Health Services, Inc., ___ F.2d ___, #84-5923 (11th Cir. 8/26/85) (private provider of medical services to county jail can be held liable under §1983 for the inadequate provision of such services to an individual prisoner); and Medina v. O'Neil, 589 F.Supp. 1028, 1038 (S.D. Tex. 1984) (a private shipping agent and a security firm who made provisions for and actually detained alien stowaways under INS detention orders could be held liable for violation of constitutional rights when the stowaways were shot).

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Nonetheless, this can only be a prediction. We obviously cannot forecast the future of Supreme Court decision-making. There are some big unknowns and here are some.

One is the fact that the Supreme Court cases in recent years arose in very different contexts than the private operation and management of correctional facilities. For example, Polk County v. Dodson, 102 S.Ct. 445 (1981) involved the question whether a public defender's decision not to prosecute a criminal appeal for an indigent; Tower v. Glover, 104 S.Ct. 2820 (1984) similarly involved a suit by an unsuccessful criminal offender against both his public defender and appellate lawyer provided at governmental expense. In Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1984), a teacher and vocational counselor sued a private school for maladjusted high school students for reinstatement in their positions. Finally Lugar v. Edmonson Oil Co., Inc., 102 S.Ct. 2744 (1982) involved the question of whether a private party (a creditor) can be sued under §1983 for invoking a state attachment statute which gave authority to the Sheriff to take possession of the debtor's property.

Another big unknown is that state action doctrine has always been highly dependent on what the lawyers call a "fact-bound" analysis. A decision from the Supreme Court will be dependent on the specific narrow set of facts that the Court confronts at that particular time. As a result the precedential value of the Court's prior decisions on state action will have less relevance to the final outcome.

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There is also to consider the make-up, and the uncertain and shifting voting patterns of the present and future members of the Supreme Court. As we have all learned, a 5-4 vote could easily turn into 5-4 the other way in a relatively short period of time.

The proponents of privatization tell us not to worry about these concerns. They are going to provide all the Constitution requires and more. They are going to provide improved facilities, sufficiently staffed by trained personnel which will provide a safer environment and improved services for prisoners.* Given the continually rising population figures, the resultant overcrowding of facilities, and the incentives to cut costs, we'll believe it when we see it. They tell us that they are going to bring better management, efficiency and innovative techniques to corrections. We'll believe it when we see it -- and what we've already seen does not give us much cause for

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* The major corporate entity in the field, the Corrections Corporation of America (CCA), touts the fact that all its contracts will include a provision promising to seek and maintain accreditation with the Commission on Accreditation for Corrections (CAC). Although the Prison Project in general supports standards development and enforcement as a step in the right direction we have major problems with the standards utilized by the CAC, the auditing process and the method by which accreditation is granted by the Commission. See Gettinger, "Accreditation on Trial", Corrections Magazine, (February, 1982); Bazelon, "The Accreditation Debate", Corrections Magazine, pp. 20-24 (December, 1982) (both articles attached hereto). Moreover as the Menard, Illinois and the Florida situations graphically demonstrate - the grant of accreditation does not necessarily mean that a facility adheres to and maintains constitutional minimum standards. Indeed the Supreme Court has held that expert opinion and professional standards do not establish constitutional standards. Bell v. Wolfish, 441 U.S. 520, 543-44 n.27 (1979) and Rhodes v. Chapman, 452 U.S. at 348 n.13.

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optimism. Privatization so far has attracted the very same, tired correctional people with the very same tired correctional attitudes and ideas who have run public institutions previously.*

And what about the public (or the taxpayer) interest in this burgeoning field?**

We are told that it will save money for the taxpayer. But consider these points:

(1) A major cost in operating facilities is labor - the staffing of these facilities to provide supervision and services. To cut costs private operators may seek to pay lower salaries to their employees. Nevertheless unions, especially in the Northeast, are not going to sit idly by while this goes on. Efforts to organize these workers will be made; strikes and labor turmoil will result. (It should be noted that in the public sector, state statutes usually ban strikes.) The final outcome may be the return of the *status quo ante* - union wage scales.

(2) And what are the pratfalls of our free enterprise system? Insolvency and bankruptcy are contingencies that must be reckoned with by prudent government officials contemplating

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* In some cases these people have dubious records of concern for the constitutional rights of people confined to these public facilities. For example concerning Charles Fenton of Buckingham Security, Ltd., see *Jordon v. Arnold*, 472 F.Supp. 265 (M.D. Pa. 1979) and *Picariello v. Fenton*, 491 F.Supp. 1021 (M.D. Pa. 1980); concerning *Terrell Don Hutto* of the the Corrections Corporation of America (CCA) see *Finney v. Hutto*, 410 F.Supp 251 (E.D. Ark. 1976) and the record in *Brown v. Hutto*, #81-0853R (E.D. Va.).

** Having said all the above about the civil liberties implications of the issue, I would like to make some personal observations about the policy implications of privatization.

contracting out the management of correctional facilities. Such officials must be prepared on perhaps short notice to adequately manage and staff a facility when the provider runs into financial problems.

Moreover the insider relationships between major private operators and government officials so well publicized in the Tennessee situation* give further pause. If contracts are indeed won and the providers later run into financial difficulties, the stage is set for government funds and loans to be provided to "bail out" the failed operators. Pressure may also be applied on Congress as well as state legislatures.

(3) If a facility is constructed and financed with a so-called lease/purchase arrangement the local government agency must still make periodic payments to the private entity who constructed and owns the facility; part of that payment will certainly include the interest that the private entity must pay to the bondholders. A municipality or county selling tax exempt bonds probably can do better than a private corporation seeking funds on the open market. Each individual county or city will make its own decision based on its own local fiscal situation. But the point to be made is that privatization will not necessarily in all cases save money.

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* The Corrections Corporation of America's (CCA) recent proposal to manage and operate the entire state prison system as well as build two major facilities is the subject of much controversy. Note in particular the political and other connections between the CCA and government officials. "Private Company Asks for Control of Tennessee Prisons," Washington Post 9/22/85 (attached).

(4) Local governments in particular must be wary that the unregulated market may give undue advantage to the sharp private contractor. A likely scenario is a county that contracts with a large national corporation which gives them a contract for say a two-year period for a "real good price" (below what the county estimates to be their costs). The corporation can afford to do this as its other operations subsidize these losing contracts. (In a related consumer context this is known as a "loss leader".) But the agreement must be renegotiated as the termination date approaches. This time around, the corporation wants much-much more and the county is in a bind because a large staff has been hired, operations and procedures established. At this point, can the county afford to pay the increased price? Obviously in this situation the county has reduced leverage and can expect to pay more than anticipated.

(5) The proponents of privatization make the claim they can put facilities "on line" more quickly than can government. Avoiding prison (and jail) siting battles and bond issue referenda is certainly an easier and more efficient method from the governmental point of view. But is it really in keeping with our most dearly-held democratic values? These so-called obstacles and hurdles were placed in state constitutions and laws for the very purpose of making it more difficult for government -- but for very good reasons.

(6) The political relationship among private operators, government officials, and legislators referred to above [in (2) above] is worrisome in another respect. As has been pointed out

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previously providers will be paid on a per prisoner/per day basis. There is obviously an incentive to keep the number of prisoner flowing into the system. Therefore control over pretrial detention, sentencing and parole policies become crucial to the profitability of the private provider. Do we wish to establish a system whereby those interested in profit margins are given an incentive to influence and control public policy with respect to crucial criminal justice issues?

When all is said and done, I agree with the legislatures of New Mexico and Pennsylvania that privatization must be examined closely before permitting public monies to be committed, contracts awarded and prisoners confined. At bottom it seems to me there are other interests to be considered beyond the narrow interest of government entities in saving money and yes, even private contractors and investment bankers in making money.*

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*Editor's Note. The following attachments are not reprinted here but are generally available to the public.

1. S. Gettinger, "Accreditation on Trial," *Corrections Magazine* (February 1982) 7-19.
2. Hon. D.L. Bazelon, "The Accreditation," *Corrections Magazine* (December 1982) 20,22-24.
3. D. Vise, "Private Company Asks for Control of Tenn. Prisons," *Washington Post* (September 22, 1985) F1, F9.

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STATEMENT BY

DAVE KELLY
PRESIDENT
COUNCIL OF PRISON LOCALS
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

BEFORE THE

SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
U. S. HOUSE OF REPRESENTATIVES

ON

THE PRIVATIZATION OF CORRECTIONS

ON

NOVEMBER 13, 1985

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My name is Cliff Steinhoff. I am the Legislative Chair of the American Federation of Government Employees' National Council of Bureau of Prison Locals. We are the exclusive representative of all Federal employees in the Bureau of Prisons.

I am pleased to have this opportunity to submit this statement on the privatization of prisons.

Before looking at the legal, practical, and economic concerns surrounding the issue of "prisons for profit", I would like to bring out some broader philosophical and ethical questions.

Our Declaration of Independence declares that there are "certain unalienable rights, that among these are life, liberty, and the pursuit of happiness -- that to secure these rights, governments are instituted among men".

The government -- and only the government -- can deny individuals these rights and only to protect these rights for the majority.

Since the Civil War, we have not given any other institution the legal authority to deny these fundamental rights from individuals. These individual rights in our society are so profound and so sacred that we only allow them to be abridged in a carefully structured criminal justice system imbued within, indeed identical to, the government.

When societies moved from justice based on might and individual revenge to justice based on law and government, it was a giant step forward for civilization. Steps in the

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opposite direction should not be taken lightly.

Remember, unlike other governmental functions -- prisons don't do things for people -- they do things to people. They deny criminals the essense of our society, FREEDOM. These acts cannot -- should not -- be trivialized. They cannot -- should not -- be sold to the highest bidder like lawn furniture before the first show.

Government has been defined as legitimized force. In the prison this force is always felt if not seen. Does the government become less legitimate, less worthy of the citizenry, when it delegates this force to the lowest bidder? We think YES.

What we are talking about is punishment for profit. We have not examined the annual reports from the Corrections Corporation of America (CCA), but perhaps they even report their profit as a rate of return per criminal.

My members work in these institutions. We have seen the dramatic increas in the inmate population. We are sure that CCA is able to report to its shareholders that business is good and the future looks promising. But, we are equally sure that if their industry takes a downturn they, like every other business, will turn to the legislature to keep them in business. Their profit is directly linked to a constant and increasing supply of incarcerated prisoners. For the first time, it is in someone's self-interest to foster and encourage incarceration. It does not take an accountant to figure out that they will act in their self-interest.

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Finally, if the committee decides that the function of punishment is an appropriate realm for the profit incentive, we hope that the committee has the courage of its convictions. We hope that it recommends to the states to privatize all the punishment functions. We have not seen a cost estimate on the death penalty. But whatever it costs, we know of "entrepreneurs" who will do it for less. We see them everyday in cell blocks across this country.

It is on these fundamental concerns that we think this committee should halt all consideration of the privatization of prisons.

On a more practical level, there are other concerns. Once a prison is built, about two-thirds of the cost of running a prison is personnel costs. If the Rent-a-Guard Corp. is going to make a profit and cut costs, it is going to do so by cutting personnel costs. Fewer correctional officers mean more escapes, more inmate attacks, and more riots. Given the stress inherent in working in prisons, longer correctional careers mean more heat attacks, more alcoholism, more nervous breakdowns -- in short -- more death. Lower salaries mean greater turnover, less qualified personnel; less job commitment; and in many cases, exploited workers. Do not be fooled or deluded by high sounding tributes to efficiency and economies of scale, as the companies cut corners to bolster the bottom line, law and morality will fall by the wayside for inmates and employees alike.

There are a complex set of legal issues which are also involved. Companies would appear to be liable for misconduct,

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but would be ineligible for protections derived from statutes and common law doctrines that preclude, or limit, the liability of public bodies. Indemnification of private corporations and their empoyees will be incredibly expensive and ultimate financial responsibility will still be with the government (see for example, Medina vs. INS).

In addition, the private sector companies often bemoan the problems of unionization. But these are private sector companies with, not surprisingly, private sector employees. Private sector employees cannot be legally prevented from organizing and bargaining with management. Equally certain, as private employees they cannot be prevented from conducting strikes and other work stoppages. Will public employees then be called on as strike breakers?

We also note that the private sector companies often are proposing a sort of skimming operation where they take only the less dangerous and less violent of inmates. This, by necessity, will require housing the worst inmates in fewer institutions -- increasing the costs of running these remaining institutions.

Along similar lines, what happens when one of these private correctional corporations goes broke? Does the government renegotiate? Who picks up the bills? Can the prison be smoothly transferred to the public or another company?

Finally comes the issue of contract monitoring. We are not talking about a once a month visit. The level of monitoring would necessarily be extensive and continuous. We suspect that the monitoring costs are not included by the privatization

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advocates.

We urge this committee to oppose privatization of Federal prisons.

Thank you.

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STATEMENT

OF THE

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES

ON THE

PRIVATIZATION OF CORRECTIONS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE

OF THE

JUDICIARY COMMITTEE OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 13, 1985

in the public service

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During the past two years, AFSCME has followed with great concern, the increasing emphasis on the private sector involvement in corrections. Although the contracting out of prison services such as medical care and educational and vocational services is not a new phenomenon; the privatization of entire correctional facilities, including the management and day-to-day operation of such facilities, has gained increased attention across the country. This idea appears particularly attractive to state and local governments that are experiencing rapidly *increasing* inmate populations and rapidly *decreasing* financial resources. The fact that the costs of providing correctional services is extremely high and that the current system is less than 100% efficient, comes as no surprise to those who have been involved in the field. But turning over the operation of correctional facilities to the private sector is not the answer.

By their own admission, private corporations are primarily interested in what they see as a $30 billion a year growth industry that offers the prospect of sizeable profits. The care, treatment, and rehabilitation of inmates is strictly of secondary interest to today's private corporations who are aggressively marketing their "we can do it better" approach complete with low cost financing and quick construction schemes. A brief review of the historical involvement of private corporations in the operation of private correctional facilities offers little hope for real progress or improvements in the field.

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In the United States, in the aftermath of the Civil War, a pernicious corrections system evolved, particularly in the South, where prison labor came to be viewed as a substitute for the now abolished slavery. Private contractors assumed total responsibility for prisoners and, in most cases, reimbursed the state a fixed amount per head. Instead of being a burden on the state treasury, prisoners were transformed into a source of revenue. Whatever the intentions of the original proponents of contracting, abuses in the system were soon apparent. In 1885 thirteen states turned their inmate populations over to private contractors; by 1923 no state allowed such a practice. This system was not abandoned because it was inefficient, but because it was inhumane. As one warden observed in 1898; "After long experience I am thoroughly convinced that no sort of supervision can be inaugurated that will prevent abuses under the private contract system."

Several more recent examples are also readily available. AFSCME's experience with the private sector delivery of public services such as nursing homes and mental health institutions, provides further evidence of the potentially disastrous consequences of injecting the profit motive into the human services field. As a result, AFSCME does not believe that the privatization of correctional institutions is in the best interest of correctional employees, inmates, or the citizens of this country.

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In addition, before the spread of privatization goes any further, there are serious legal, ethical, and public policy questions which must be addressed. Examples of such issues are highlighted below.

1. **Legal Liabilities**: Although a state may contract out the management and operation of its correctional facilities, it remains questionable whether it can relinquish the legal responsibility for the incarceration of inmates. In a recent court case involving several illegal immigrants and a private security company in Houston, Texas, a U.S. District Judge wrote that "pertinent to the facts of this case is the 'public function' concept which provides that a state action does exist even when that state delegates to a private party a power traditionally reserved to the state." The fact that a state or local government has a legal contract with a private corporation that has liability insurance to protect itself may not necessarily protect a state or local government from such liability. At the very least, it is sure to involve a long and costly legal challenge which most state and local governments cannot afford.

2. **Conflict of Interest**: The privatization of state, county, or local correctional facilities appears to create an inherent conflict between the interests of the private, profit-oriented corporation which seeks to maximize profits by keeping

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correctional facilities operating at maximum capacity, and the state's responsibility to house, train, and rehabilitate inmates. Currently, many states have been criticized for simply "warehousing" inmates. Merely transfering this warehousing function to a private corporation will not improve the current criminal justice system. Based upon past experience, such a transformation may subject the system to even greater abuse.

3. Cutting Costs: One of the most attractive selling points currently proposed by corporate marketing experts trying to get their foot in the door is that they can operate corrections institutions cheaper and more efficiently than public sector managers.

Different correctional systems over the past decade have tapped every available source of correctional expertise, as well as the management skills of prestigious accounting firms and consulting sources like the Wharton School of Business to streamline manning rosters, limit posts, and contain overtime. All for naught. The fundamental business of corrections is supervision. Technical gadgetry and computerized scheduling have done little to lower the cost of such supervision.

All of this means that the only way left to significantly reduce the operating costs of correctional facilities is to reduce the number and/or the salaries and benefits of line correctional staff. This is, despite all the disclaimers, the heart and soul of the private corporate prescription for the more

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efficient operation of correctional facilities. All one has to do is to listen to the complaints of veteran public correctional administrators, those same individuals who now run private correctional entities, and note the repetitious lament about how restrictive collective bargaining agreements and civil service regulations keep getting in the way of genuine efficiency. For them, the reduction or elimination of these barriers to progress is the key to effective cost containment. It is one of those delicious ironies of human nature that while these newly privatized moguls are zeroing in on the reduction in pay and benefits of correctional line staff, their own salaries in the brave new world of private corrections tend to substantially exceed their former public earnings.

Although the concept of private companies managing and operating correctional facilities has gained increased attention among elected officials, fortunately state and local officials are moving cautiously in this area. In fact, currently there are no state correctional facilities being managed or operated by the private sector.

Further, various state legislatures have considered different types of proposals addressing this issue, but in the end, they have voted against giving authority to contract out prisons.

For example, in Virginia, a House Joint Resolution requesting the formation of a study committee to look at private

TESTIMONY ON PRIVATIZATION OF CORRECTIONS BEFORE HOUSE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

BY RICHARD CRANE

VICE PRESIDENT - LEGAL AFFAIRS

CORRECTIONS CORPORATION OF AMERICA

NOVEMBER 6, 1985

The concept of contracting with private companies to provide government services is not new. For the first 100 years or so of this country's existence, most public services were provided by or performed by private companies. Transportation and fire protection, for example, were performed for many years under contract by private companies.

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Mr. Kastenmeier. Now, I would like to welcome and introduce the panel of distinguished witnesses. First, Mr. Richard G. Crane, the vice president of Legal Affairs for the Corrections Corporation of America. Mr. Crane is an attorney who has previously served as chief legal counsel for the Louisiana Department of Corrections. He is a consultant to the National Institute of Corrections and has also been in private practice specializing in corrections.

Also with us is Sheriff M. Wayne Huggins, who has been the Sheriff of Fairfax County, VA for 6 years, and is representing the National Sheriffs' Association. Although not representing them, I would like to note that Sheriff Huggins is the chairman elect of the Commission on Accreditation for Corrections.

Our third panelist is Mr. Ira P. Robbins, who is a professor of law and justice at the American University, Washington College of Law, and is a prolific author and authority on the subject of prisoners' rights. He is presently serving as a judicial fellow at the Federal Judicial Center.

Each of the witnesses has other accomplishments and honors which I will not mention at this point. I welcome you all.

Mr. Kastenmeier. First, I would like to call on Mr. Crane.

STATEMENTS OF RICHARD G. CRANE, VICE PRESIDENT, LEGAL AFFAIRS, CORRECTIONS CORPORATION OF AMERICA, NASHVILLE, TN; SHERIFF M. WAYNE HUGGINS, SHERIFF, FAIRFAX, VA, ON BEHALF OF THE NATIONAL SHERIFFS' ASSOCIATION; AND IRA P. ROBBINS, BARNARD T. WELSH SCHOLAR AND PROFESSOR OF LAW AND JUSTICE, THE AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, WASHINGTON, DC.

Mr. Crane. Thank you, Mr. Chairman.

I appreciate the invitation to be here with you today to talk a little bit about privatization generally and about Corrections Corporation of America.

I know that the committee has questions. I will keep my statement very brief so we will have time, and I will be more direct to your particular concerns.

But, as the chairman mentioned, the privatization idea is not a new one. There was privatization before the turn of the century, and many areas traditionally—fire protection, for example—were handled privately.

There is though an aspect of privatization of corrections which sometimes gets us in trouble and that is the abuses prior to 1900 of inmates who were leased out as slave labor. In 1871 a court just very near here in Virginia handed down a ruling in which it said prisoners were no more than slaves of the State. You then had States selling the labor of prisoners to private companies who were going to make a profit on the backs of inmates. Obviously you are going to have abuses of that type of system, and obviously probably many of the inmates at that time had been slaves and the mentality was such that would permit that type of thing.

This is not a relevant comparison to the privatization that we are talking about today in 1985 when the courts have said over, and over, and over again that the Constitution does not stop at the prison door. So you are not going to have the types of abuses you had back then because of the constitutional protections that inmates now have and because of other protections that can be built into the contract and into the monitoring and perhaps even into legislation.

As the chairman mentioned, our first facility was one that we constructed for $5 million in Houston, TX. It is very near the Houston Intercontinental Airport, because INS is finding in that area of the country that they are getting many illegal aliens who are not from Mexico so they are needing to fly them back into Central and South America. They wanted a facility near the airport, and we provided that. It is 350 beds. We have 200 males and 50 females there.

Our initial price per day per inmate was $23.84 per inmate that we were paid there. At the same time what INS had been paying for the incarceration of inmates in jails or aliens, excuse me, in jails was $34.85 a day. So it was a considerable savings to the Government when we constructed the facility. We have a 5-year contract and we are locked in on what we can charge. Each year it does escalate, of course, for inflation; and presently we receive $27.06 a day per person, but the contract is such that we cannot in any way get the Government into a position where they are relying on us and then jump the price up.

We own the facility outright. The Government did not have to borrow any money. We provided the $5 million in capital expenditures for the land and construction.

We also did something I think is quite significant. The government in their RFP, their request for proposal, asked that the facility meet Federal standards, INS standards. We went beyond that. We said we would meet the American Correctional Association standards. The Supreme Court has said on at least two occasions that those standards by the ACA go beyond those that would be required by the Constitution. So we are going further. We are not just going to be on the cutting edge of constitutional rights of inmates; we are going much further.

At the same time—and something most people have a lot of difficulty understanding—we can do it less expensively. We know, for example, that our construction costs are about 80 percent of what the Government pays for construction. Contractors, it appears, will generally bid higher on Government work because of the redtape and the delays and so forth, and our experience thus far is to say we can do it for 80 percent.

We also can operate far more efficiently. We have a much lower turnover rate. Across the country the turnover rate of correctional officers is 30 percent a year. Ours is about 15 percent. Ours at the facilities that we took over generally is 30 percent the first year and then it goes down. The cost of training correctional officers is very, very high. We are able to—by retaining employees, by making it a career, we are able to retain these employees and not have those additional expenses of retraining people all the time.

We do not cut salaries. The last facility we took over, a going operation, we took over the Bay County, FL, jail on October 1, 1985. All of the employees got a 7-percent yearly raise, plus an additional $500 raise. We raised by about $2,000 the starting salary for new correctional officers coming into the system.

There is a lot of talk about private companies cutting corners to make money. I have given to the chairman a copy of the plan we have just given to the State of Tennessee to take over the entire operation of their facility, and I would just mention a few things that will show we are not just doing the basics. We have increased the teacher-to-student ratio at every prison in Tennessee in our plan, the ratio of 1 teacher for every 15 inmates. We increased the teachers' salaries by 5 percent. We increased the number of counselors in the Tennessee State prison system to reflect caseloads of 70 inmates per counselor. Presently there are over 100 inmates per counselor. We are putting $10 million into the work, the industries program in the Tennessee prison system. We will increase the number of jobs for inmates by over a 100 percent.

We pay overtime. We do not give comp time. Under the Fair Labor Standards Act our employees are paid overtime. We think that is appropriate. Congress has just passed—and we frankly do not know if the House has accepted the conference committee report, but I am told that you have, that would allow the counties and States not to pay overtime again where they have not paid it before the *Garcia* v. *San Antonio* case. We pay. We think it should be paid. We think people deserve that.

In addition to that, we also pay under the Federal Contract Work and Safety Standards Act overtime not just for over 40 hours a week; we pay overtime at our three federal facilities for everything over 8 hours in a day, even if a person does not work 40 hours in that week.

I will conclude by saying that there are a number of objections on legal grounds to the incarceration of prisoners by private companies. I do not think they are well founded. I think the intentions are good. There is concern about the rights of the inmates, but I believe that all of these matters can be addressed in the contract. They can be addressed by requiring standards. We agree to abide by the ACA standards at all of our facilities unless we are in a State that has stricter standards, in which case, as in Florida, we abide by those voluntarily. For example, in Florida under the Florida jail standards correctional officers are required to have 360 hours of basic training for their employ. ACA standards only require 120 hours. We are at our expense providing 360 hours because we do not want anybody to say we are making a profit because we are a cost-cutting concern. But the law does not require we do that, although we have agreed to go and testify in Florida before the legislature that they ought to change the law, and the private company should do the same as the State, and we think that is appropriate.

I will conclude here in order to have time for questions later.

[The statement of Richard G. Crane follows:]

sector involvement in the operation of prisons was defeated 10-0 in the Virginia Legislature during the 1985 session.

In Maryland, a House Joint Resolution similar to the one introduced in Virginia was introduced in Maryland. It was soundly defeated in Committee.

In Pennsylvania, the House recently approved a bill calling for a one-year ban on private prisons in the state. The bill was sent to the Senate Judiciary Committee for further discussion and debate.

Obviously, these different states realized that there are serious legal, moral, and ethical questions associated with the contracting out of correctional facilities. Imprisonment strikes at the most cherished notion in our philosophical and political heritage, the concept of individual liberty and freedom. We should not be prepared to turn over to the private sector this uniquely governmental function of imposing punishment on our fellow citizens. Nor should we be so deeply enamored with private enterprise that we are prepared to parcel out opportunities to some of our citizens to reap a profit from the punishment of others.

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Then came a period in history when government attempted to provide an increasing number of services through its own structures. In recent years, however, the pendulum has been swinging in the other direction. Now, governments often turn to private professional engineering firms to manage water and waste water treatment services. Likewise, many public transit systems, airports and public buildings are managed by private firms.

Within the corrections system itself there are a number of precedents for private operation. But, the leasing of convict labor is not one of them. It is true, that in the south, up until the turn of the century it was a common practice for states to lease out convicts to plantation owners, railroads and coal mining companies. That was at a time when, as one court put it, prisoners were "slaves of the state." (Ruffin v. Commonwealth, 62 VA. 790 (1871)). But, today it is clearly recognized that prisoners have constitutional rights under the protection of the Constitution. Private providers of health care, food service, education, rehabilitation programs and transportation have been welcomed into public jails and prisons. In this environment, Corrections Corporation of America was chartered in Nashville, Tennessee in 1983 and in November of that year received a contract for the construction and operation of a facility in Houston, Texas to house undocumented aliens for the Immigration and Naturalization Service. CCA erected a building which houses 350 individuals at a cost of $5,000,000 for land and construction. The building is managed by CCA at a cost of $27.06 per inmate per day. Since that beginning, CCA has received six additional contracts for the care and custody of additional illegal aliens, male and female felons and misdemeanants, and juvenile delinquents sentenced and awaiting trial.

Why would a company want to manage correctional facilities for profit and why would government award them contracts? There are a number of answers and a lot depends on the particular need. For example, if a state or county is under a court imposed population cap then their immediate need may be new beds as quickly as possible. This private enterprise can do. In Laredo, Texas, CCA signed a contract with INS on the 12th day of July, 1984 for the construction of a building to house 150 adult male and female and juvenile undocumented aliens. The facility was opened for occupancy on March 15, 1985.

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Often, the issue is money. Can it be done in a less expensive way? The answer clearly appears to be yes. For example, our experience has indicated that we can construct new facilities for about 80% of what it costs government. Additionally, we can bring economies of scale to the operation. And I think it goes without saying that private enterprise can be a lot more efficient than government. Lastly, there is the question of personnel cost. Some critics of privatization say that we will save money by reducing the number of employees. But, in the two ongoing facilities which CCA contracted to take over, we agreed as part of the contract to allow all employees who wished to transfer to our payrolls. We also didn't cut their salaries. In fact, when we took over the operation of the Bay County Florida Jail this October, we increased each employee's yearly salary by 7% plus an additional $500.

Nevertheless, it is possible to save money on personnel costs. One way is to cut down on the approximately 30% turnover rate in corrections employees today. This can be done through better training, better recruiting and better supervision. We have

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also found that considerable savings can be had by working hard to eliminate overtime. Through poor planning and poor supervision, overtime rates for most correctional agencies are astronomical.

These are the reasons for privatization, but what are the reasons against it? CCA has spared no expense in researching the question of whether or not contracts with private vendors for corrections services violate the U.S. Constitution. Thus far, neither our research nor that of anyone else has indicated that there is any constitutional impediment to such contracts. But, there have been those who, citing such terms as "state sovereignty" "care and custody" and "police powers", say that the actual custodial function cannot be delegated beyond the state. This is absurd. Title 18, Section 40.82 of the U.S. Code states that persons convicted of offenses against the United States shall be committed to "the custody of the Attorney General of the United States." It goes on to state that he can "designate the place of confinement where the sentence shall be served." Utilizing this authority he may "designate as a place of confinement any available, suitable and appropriate institution or facility whether maintained by the federal government or otherwise...." Most states have similar type

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language. And, until only recently, no one objected in the least that the state or federal government could appoint an agent to carry out the custodial portion of the sentence. In fact, the Bureau of Prisons has contracts with many, many private companies for the housing of offenders. Its true that most of these are community treatment centers, but if anyone thinks that this doesn't amount to "custody" I would suggest they give it a try for a week or two.

There are also those who say that in pursuit of the almighty dollar, private prison operators will cut corners. Such statements are most often made by those who have spent the last ten years doing everything within their power to get government to provide jails and prisons needing even the most minimal of constitutional standards.

There is absolutely no question that the legacy of the "hands off" period of judicial non-intervention in correctional matters is still persuasive in many places. Having represented a state department of corrections through this very same ordeal, I can say that progress is just about as excruciating from the state side. Getting a governmental response is a slow and arduous process; particularly when you are dealing with large sums of the taxpayers' money.

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Why do such conditions persist even after court orders, special masters and extraordinary legislative sessions? Because there are only a few pressure points. Prisons are needed and you can't just "fire" the state for mismanagement.

But, with private companies, there are lots of good pressure points. First, they can be found in default of the contract. Or if you prefer, you can ruin their reputation through the media; destroying their ability to market their services elsewhere. This cutting corners idea attributes to man only the basest of motives. It does not recognize that there are good responsible pillars of the community type people who want this concept to work as an industry in the long term and not for a fleeting overnight stand. Yes, there are indeed con-artists in this world. But, if we are going to attribute that attitude to everyone then the government better get in the business of running everything from used car lots to taco stands.

Another objection to privatization is that the company has no experience in managing this or that type of facility. This is as red a herring as you are likely to find. What experience do most new governors have in the field of corrections? And what

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about corrections commissioners? Very often they have none. Yet, they somehow manage to muddle through. On the other hand, private companies, at least CCA, have a great deal of experience in the operation of all phases of corrections. We have seven former commissioners of corrections working for us daily or on our advisory committee. Our head of food services was in charge of food services for the entire Virginia Department of Correction. Prior to that he was director of food services for the Marriott. If anyone should be using the "no experience" argument it should be us. Our over 160 years of correctional experience among top management is surely better than any you will find in most state corrections systems.

What about the proposition that in order to make a profit a private corporation will skimp or totally eliminate all programs designed to train and rehabilitate inmates. The answer to that is simple. Impose in the contract a set of standards for the operation of the facility which will ensure that such cost cutting doesn't occur. In all of CCA's contracts we agree to abide by the American Correctional Association Standards. We think that everyone should.

How else do you protect the inmates and the public? By

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monitoring the contract. This is one thing that most state and local governments don't do to themselves. Yet, we insist as part of our contract that a person or persons be selected whose job it is to inspect our facilities and operations as often as they feel appropriate to ensure that we are following all the terms of the contract.

There are a number of distinct advantages that are inherent to the privatization concept. Private corrections management offers the availability of private capital, fast speed of response, program and management quality assurances, guaranteed cost and the potential for cost savings at both the construction and operations level. Private contract management firms in this country have developed staff with exceptionally strong business and corrections credentials. There are a number of examples where in the private sector management firms have been able to bring all the advantages discussed previously to a particular project. Governments who have been involved in such contracting are reporting that the service delivery, as well as the economies that were projected, have met and/or exceeded the government's expectations.

CCA and other companies involved in this approach to meeting the

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corrections management needs have also guaranteed to indemnify government at all levels should lawsuits be filed. This simply means that if there is a suit regarding the operation of a privately run facility, the contractor will be responsible for the payment of damages and costs. The cost savings of such a guarantee to government is incalculable and can drastically improve government's position in regard to budgetary control. The future of this new private initiative is one that may be difficult to predict; however, if the successes of the last several years in this industry continue, one can safely assume that government has been provided another viable tool to use in meeting the public's need for public safety and appropriate constitutional confinement.

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Mr. **Kastenmeier**. Thank you very much, Mr. Crane. I think we will have some questions of you now, and then proceed with the other witnesses. And perhaps you can remain for other possible questions.

Well, as far as accreditation is concerned, for example, the Bureau of Prisons is attempting to get all their facilities accredited. I think there are 15 out of 50 now accredited, but even accreditation does not mean necessarily—that is to say, some courts have found some accredited institutions do not meet constitutional standards. Accreditation may only mean that they in part have acceptable standards or in other respects are attempting to achieve certain standards. So that is sort of an illusive target really.

I would like to ask you—and we are grateful for your giving us this plan for the State of Tennessee which we just received this morning so we have not had an opportunity to evaluate it. Does this mean that it is the intention under a 99-year lease that the Corrections Corp. of America would operate the entire State correctional system for the State of Tennessee?

Mr. **Crane**. Just about. We would have everything, all of the institutions. We would not operate the inspection part of what the Department of Corrections does nor the adult probation which is part of the Department of Corrections; and in addition to that—we have put all the money into our plan to show that this is what the true costs is—the State is going to need to have a monitoring function. They are going to have a chief monitor and deputy monitor to be sure that we are abiding by the contractual relationship, to assure we are not abusing the inmates in any way. But absent that, yes, sir, it would be the whole thing. It is 50 years though, not 99.

Mr. **Kastenmeier**. Fifty years.

Mr. **Crane**. Yes.

Mr. **Kastenmeier**. Now I would like you, if you would, to briefly as possible describe each of the seven facilities you now operate in terms of size, governmental authority you contract with, whether it is the county or State, whether any Federal prisoners are in these facilities, what the level of incarceration is, and whether you own the land or buildings or lease them.

And I also would like to ask whether in Tennessee prospectively this would mean that their maximum security institutions—where presumably they would have some of the more difficult and violent offenders—you are going to be undertaking those as well?

Mr. **Crane**. Yes, sir.

Mr. **Kastenmeier**. Are any of the seven facilities you now operate maximum security institutions?

Mr. **Crane**. Yes. The Bay County, FL jail—jails, by definition, have to be capable of housing maximum security because you get every type from murderers on down.

Mr. **Kastenmeier**. Although they are normally smaller institutions in terms of the number of persons incarcerated.

Mr. **Crane**. Yes, sir. We have now—and I think your question is a good one—we have over 160 years of management level experience in the operation of every type of facility. I was chief counsel for a system larger than the Tennessee system, and we had death row, executions, we had every type of prisoner, every type of operation. We have three former commissioners of corrections who work for us full time, who have operated entire systems. Frankly, we have more experience than the State of Tennessee does. The fact that the company, CCA, has not operated those facilities is no different from a new Governor coming in. You say the Governor never operated them either, but he can hire the people to operate. So that is our position. We feel comfortable we can handle those types of facilities.

Mr. KASTENMEIER. Without yielding to the temptation to overdescribe, can you describe the difference between what one would find today in, say, a small- or medium-sized institution that is operated by you as opposed to that which would be operated by, let's say, a State authority under normal, more traditional means? What would be the distinguishing characteristics that someone evaluating these institutions would find?

Mr. CRANE. I think you would find ongoing expenditures to maintain the building in a constitutional condition. What happens in State government is they spend the money upfront to build it and then traditionally always underbudget for the maintenance, so that is a cost, that we need to keep that building up. We do not need to be building another one 5 years down the line.

Tennessee, for example, has such a facility that we know the way it is being operated—it is built for 400 and it has 800 people in it. Just the whole system is crumbling there and it is not going to be usable as a prison much longer unless some drastic steps are made.

Additionally, we would have more programming. Our view is that there are 168 hours in the week and the inmate needs to be programmed, and we need to know what he is going to be doing during those hours. He needs to be at work, he needs to be engaged in some type of program, needs to be at some governmental service job. We have—and you will see it in the plan, the chart that sets that out. And it is not easy to come up with work for inmates.

One thing, if you are interested in some legislation, would be some changes in the laws on the transportation and sale of prison-made goods because they cannot be sold except to governmental agencies. We are working on that. We have legislation before the legislature there in Tennessee to change that.

I believe that you would find that with our employees there is more of an espirit de corps, that our employees can be rewarded for the things that they do. We can throw picnics for them. We can give them free trips to some place and, in fact, we do have our employees, even the line correctional officers, go on marketing trips where they can go into an institution and talk. So there is more of a feeling of belonging to a company. You have the opportunity to move to other facilities, to other States. In a large State system perhaps this is not as important; but in a county jail, if the person achieved the rank of lieutenant, let's say, he has nowhere to go after that. He is just stuck and locked in that one position.

Mr. KASTENMEIER. One thing you mentioned was relaxation of restrictions on the sale of prison industry products which could be achieved by the State authority as well as by a privately run correctional facility. Why would that not be good, whether it is run by the State or run by CCA?

Mr. **Crane**. Well, I think one of the reasons is that, for example, in Tennessee there is an industry restitution law that permits industries to come into the grounds of a facility, pay the prevailing wage to inmates and operate some type of an enterprise. No one has ever approached the State of Tennessee to do that nor, I guess, has the State gone out and tried to find someone. But I think one of the problems is that people in business are suspect of the State's ability to understand the profit motive, and I think that is true; and when you are in private business you do not need the inmates coming in at 8:20 when the count is clear. You need them there at 8. So there just has been a reluctance to work with private enterprise on that.

Mr. **Kastenmeier**. I have a good many other questions. I would like to yield to my colleague. I will yield to the gentleman from California.

Mr. **Moorhead**. Thank you, Mr. Chairman.

Have you had any escapes or riots in any of your facilities?

Mr. **Crane**. We have had no riots, but we had escapes at about the same level that government has had or less.

Mr. **Moorhead**. About how many would you suggest you have had so far?

Mr. **Crane**. In the Chattanooga facility we have had probably—and I am sorry. I am going to say 10, Mr. Moorhead, but I will send you the statistics.

Mr. **Moorhead**. You will furnish that material for us.

[The information follows in appendix I(A):]

Mr. **Moorhead**. You talked about a lot of things. I wonder what kind of food do you have? Is it nutritious food that you serve or is it just the minimum you can get by with? How do you plan to take care of those needs in prisons?

Mr. **Crane**. We are very proud of our food service. We have a former food service director from the Marriott chain who worked as the food service director for the Virginia Department of Corrections, and we provide the inmates with a very good diet. We have a 14-day cycle on the menus. Everything is approved by dieticians, and we understand the importance of inmates being happy about the food because that impacts security directly. And when we took over the Bay County, FL, system on October 1, I think our food service director would have been elected warden if we had an election, and it was not a special meal. It was just a regular breakfast the way we did it.

Mr. **Moorhead**. What percent of people incarcerated do you find work for? Are they paid for their work and what would be their hours?

Mr. **Crane**. OK. There are different kinds of work in a facility. First of all, there is institutional maintenance. You have them working in the kitchen. You have them cleaning the house, those types of things. We would pay what government pays, if government pays. INS or the Bureau of Prisons does not pay. We have had a problem there. We would like to be able to pay, but it is not minimum wage; no, sir. But neither is it to the benefit of us. It is for the benefit of government because it reduces our costs which we would, obviously, pass on to them.

At our facilities, more traditional facilities, you can legitimately only expect to have 75 percent of your inmates working. You would have special-management cases, you have the ill, people in transit, that type of thing. Our goal is to have jobs for that many people. Those, depending on the nature of the jobs, if it is in competition with private business on the outside, we would pay prevailing wage. Other than that, in Tennessee, we would pay the Tennessee scale which is $1.25 to $3.25 a day is what they get.

Mr. **Moorhead**. Do you have something available for anyone who would want to work, who would be willing to?

Mr. **Crane**. No, sir, we do not. At the facilities in Houston and Laredo for undocumented aliens, no, we do not.

Mr. **Moorhead**. How about your regular prisons in Tennessee?

Mr. **Crane**. The jails we have, we are working in that direction. No, sir, we do not yet. We have more than when we took over.

Mr. **Moorhead**. Is that a goal you are trying to achieve?

Mr. **Crane**. Yes, it is very important.

Mr. **Moorhead**. I do not believe in coddling prisoners, but at the same time you have got to maintain the kind of an environment that would encourage them to reform and live a straight life after they got out. So let me ask you, if you were going to be in one of these institutions, would you rather be in one of your institutions or in one run by the State?

Mr. **Crane**. I would rather be in one of ours.

Mr. **Moorhead**. Why?

Mr. **Crane**. Because I think they are run more consistently across the board because you do not have that lack of continuity. In the State prison system in Tennessee they have had, I believe, five directors in 8 years, and this is a lack of continuity. You have different policies. They did away with all the rehabilitative things in 1980 in Tennessee. Now they are trying to put them back in place, and that is No. 1.

Second, I think we operate more secure, safe facilities, and I think that they are a lot cleaner and maintained a lot better.

Mr. **Moorhead**. Is it your position that there is no need for additional legislative authority to privatize any Federal Bureau of Prisons facility or to create new private correctional facilities?

Mr. **Crane**. My position is none is needed. The chairman said something in his opening remarks that I did not catch all of that sort of indicated that someone in the BOP had taken the position they needed more, but, presently, in title 18, United States Code, section 402 it says that the Attorney General can designate as a place of confinement any available, suitable, and appropriate institutional facilities whether maintained by the Federal Government or otherwise. The language for INS is not as clear. I would not mind having it clarified, but INS feels comfortable they can do it, and I feel comfortable they can.

Mr. **Moorhead**. Have you had any problems or any disputes with law enforcement in the areas you have been involved in, say, with the sheriffs, or the State, or Federal law enforcement officers? How have you gotten along with them?

Mr. **Crane**. We haven't had any problem with Federal officials. We have had a problem with sheriffs who wanted to hold on to the system, and in Bay County, FL, where the county commission took it away from the sheriff, yes, there are problems with the sheriff. One, for example, was overaccess to records, prior medical records, and another was overaccess to criminal history records.

We think that the law is clear on those. I am certain that the medical wouldn't even come within the purview of Congress, but the National Criminal Information Center records, perhaps, is something that could be addressed with the idea of providing those records directly to us. Right now we can get them but we have to get them through a law enforcement agency.

Mr. **Moorhead**. One final question. How do you proceed to interest someone in a contract to operate a corrections facility? Are you the only organization out there doing this kind of thing?

Mr. **Crane**. We are the largest. We have the most varied facilities. No one else, for example, has a jail at all that they are operating fully themselves. We don't go knocking on any jail doors. The people come to us. There has been a great deal of publicity. The counties particularly are desperate for means to hold down their costs, and particularly where they can't get the capital that they need for new construction.

In Florida, a number of counties are under court order for suits brought by, ironically, the State department of corrections, which has an oversight responsibility in Florida, and so these counties are looking for the capital, the infusion of capital, without their having to raise the money themselves.

Mr. **Moorhead**. You had suits filed against you?

Mr. **Crane**. We have a suit pending on the INS operation in Laredo on a search of one of the inmates, one of the detainees, and we had a suit which we won, which had to do with zoning, or deed restrictions rather, on the property, and that is it.

Mr. **Moorhead**. Thank you very much.

I would like to now yield to the gentleman from Kentucky.

Mr. **Mazzoli**. Thank you, Mr. Chairman.

Do you train your own correctional people or do you recruit from existing pools?

Mr. **Crane**. Well, both actually. What we do in those situations where we take over an existing facility is we agree to hire all the employees, provided that they pass our training. They come to our training and they take the test, and the two facilities there has been no problem with people not being able to pass it, but we don't want to just take somebody who just sleeps through it.

Mr. **Mazzoli**. Do you have a central training facility?

Mr. **Crane**. No, not yet.

Mr. **Mazzoli**. On the premises is where you train them?

Mr. **Crane**. Or at a hotel in Bay County. We use the hotel meeting rooms to train. It depends on the situation. We will eventually have our own training facilities.

Mr. **Mazzoli**. You train them in the use of sidearms, firearms, crowd control, riot control, personal surveillance, things of that nature?

Mr. **Crane**. Yes, sir, we do. Now, on the firearms, only at facilities where they would be used. Our INS facilities, for example, are minimum security. We have no weapons there, so, no, they haven't been trained, but at those facilities where they are used, those people——

Mr. **Mazzoli**. In how many of your facilities do your employees actually carry arms or at least someone on the premises would be armed?

Mr. **Crane**. Just one.

Mr. **Mazzoli**. One of the seven?

Mr. **Crane**. Yes, the jail.

Mr. **Mazzoli**. Of the facilities in Tennessee that you are making a bid for—and I assume it is a bid—you are not assured of the contract; is that correct?

Mr. **Crane**. Well, it will be a request for proposals. It is not a bid but it is similar, yes. The legislation doesn't say that we get it.

Mr. **Mazzoli**. So CCA is not assured of this operation?

Mr. **Crane**. That is correct.

Mr. **Mazzoli**. Are there other people bidding or responding to this request for proposal?

Mr. **Crane**. Well, it hasn't gotten that far. The legislation—and I have a copy I will leave with the committee. It is about a 20-page piece of legislation. It covers a lot of these issues. It covers the use of force, and sidearms, and so forth, and who is going to regulate that, and who is going to determine the training that is possible. But this needs to be passed first. This authorizes this venture, and then the R.P. will be drawn from that.

Mr. **Mazzoli**. In the one facility where your people are armed, or at least wear sidearms, or that arms are available, are they the ones who are trained to solve a riot situation, should one arise, or would you call in the local constabulary?

Mr. **Crane**. We would call in the local. We have emergency plans and working agreements with them for those types of situations.

Mr. **Mazzoli**. Could one of your people shoot at somebody who is escaping from that one prison or one facility?

Mr. **Crane**. Yes, sir.

Mr. **Mazzoli**. They could?

Mr. **Crane**. Yes, sir.

Mr. **Mazzoli**. And they are allowed to by State law?

Mr. **Crane**. Yes, sir. Most States—Florida, where we are talking about is one—have pretty much a model piece of legislation on private security agencies, and you know there are all these groups like Brink's, and so forth, that provide that, and you need to go through those procedures and have your training certified and that type of thing. Everyone should do that, and yes, you could.

Mr. **Mazzoli**. What do your people wear. Do they wear uniforms?

Mr. **Crane**. Uniforms.

Mr. **Mazzoli**. The same uniform that would be standard, blue trousers and so on?

Mr. **Crane**. No, brown is our color, light and dark brown.

Mr. **Mazzoli**. You mentioned in answer to Mr. Moorhead's question that you had no riots. You have seven facilities, one of which is secured.

Mr. **Crane**. Correct.

Mr. **Mazzoli**. Have you had any near misses in that one facility? I assume that is where you probably had trouble. Have you had any near misses, near calls?

Mr. **Crane**. No; but in all fairness we have only been there 1 month. I am not saying something like that would not develop, but not yet.

Mr. **Mazzoli**. You are a professional in this business. Why do you think riots occur? What are the two or three causes? When I say "riots", that is a loose term. Just difficulty and chaos within a prison.

Mr. **Crane**. I think it would be a number of things. I mentioned to Mr. Moorhead the problem with the food service. I think that is one area. If food is really bad day in and day out and any of you who have been in the service know the frustrations that you can feel, that is an area where it occurs.

Another seems to be where there is some abusive officer who might trigger something by beating one inmate where others can see or hear it. It is really hard to pinpoint.

In Tennessee, where they have had riots this past summer, a number, it happened to be the catalyst was that the legislature had passed a law requiring them to wear striped uniforms again, and so that was——

Mr. **Mazzoli**. How about the space that you allot for each individual? Assuming that you will take over maximum security facilities, which we continually hear are overcrowded, how do you propose to get them down to the regulations, to the accreditation rules?

Mr. **Crane**. What we are going to have to do in Tennessee is build four new facilities: two 500-bed medium security, two 500-bed maximum security. That is not going to give the State, though, 4,000 more beds. We are trying to make that very clear to them, because they have facilities there that are overcrowded. They have the State penitentiary, which will be 100 years old next year, which needs to be demolished, so we will provide them with some increase in bedspace but not fully, because we need that space to pull those other people out of the facilities where they do not have—we want to have 70 square feet.

Well, depending on the type of inmate, the right amount of square footage, so that we can be accredited by ACA, that's our goal.

Mr. **Mazzoli**. Certainly the idea of this is a very appealing idea because we realize our prisons are not being run correctly now between the overcrowded conditions and the sometimes abusive conditions.

On the other hand, you will excuse me if there are times when this seems like the perpetual motion machine, however, where you can take a facility that nobody up to now has been able to run efficiently, effectively, nonabusively, and within a cost-effective framework you can run it efficiently, effectively, and make a big bunch of money on it. Am I incorrect? Is this just the way private enterprise approaches a problem, with efficiency, where we have a happy workforce, or is this a perpetual motion machine which could break down and then the States are the worse for it because they pledge their troth to you and you have perhaps not been able to follow through. Which is it?

Mr. **Crane**. Well, I think that it is a combination of the private sector's ability to manage and the professional expertise that we have brought to bear on the subject. We have, as I mentioned, over 160 years of management corrections experience in our central office. We have learned a lot. When I went to work for the Louisiana Department of Corrections——

Mr. MAZZOLI. When you say 160, you are counting the number of people and how many years they have been in it. This isn't to say CCA has been in it 160?

Mr. CRANE. No; just the number of people.

Mr. MAZZOLI. I think that ought to be corrected because I heard it said earlier—you said 160 years of experience. That means the number of people that you have in your head office and you multiply the number of years they have had.

Mr. CRANE. That is correct. I am sorry if that was——

Mr. KASTENMEIER. If the gentleman will yield, I wondered too whether you had been operating since 1825.

Mr. CRANE. No; among our top management people collectively we have 160 years. I have surely learned quite a bit. I think actually anybody in corrections learned quite a bit about the rights of inmates. When we go to build a new facility, we build it constitutionally. We did not know what constitution was back in 1965 and 1970, so there are a lot of things. We are at an advantage in a lot of ways.

You mentioned, though, the problem with what happens. The State is wed to this idea and what is going to happen? Our contract in Tennessee, our proposed contract has a perpetual 2-year termination date. In other words, you could quit today; 2 years from now we are gone. This is for no reason, no fault. You do not like it. We will leave. You pay us back the cost, the money we put in in 1985 dollars, if it is 1990. You just pay us what we put into it, $50 million for this facility and so forth. Most of our other contracts are like that. Our government, our Federal contracts, are on a yearly basis. We are the ones taking the risk. I do not think the States will be.

Mr. MAZZOLI. I thank you, Mr. Chairman.

Mr. KASTENMEIER. I would like to now yield to the gentleman from Florida.

Mr. SWINDALL. Georgia. That is close.

I wanted to ask you about financing the CCA. How many stockholders are there?

Mr. CRANE. There are approximately—now I am the attorney, so please bear with me, but there are approximately 200 privately held at the moment. But we will be happy to make that list available to you. There is nothing we are trying to hide.

Mr. SWINDALL. Are there any loans or security interests outstanding on the physical facilities?

Mr. CRANE. Yes, different types. Some bank loans draw down a line of credit, some funding—there are a variety of methods that we use and, of course, the money that we have gotten from our stock sales. Our Houston facility, though, is paid fully.

Mr. SWINDALL. With respect to the various facilities, at this point none has more than a 1-year track record; is that correct?

Mr. CRANE. Well, the Houston facility has been operational since January 1984.

Mr. SWINDALL. So it is slightly over a year.

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Mr. Crane. Yes.

Mr. Swindall. With respect to that facility——

Mr. Crane. No, almost 2 years.

Mr. Swindall. With respect to each of those years, I assume that projections were done, financial projections.

Mr. Crane. Yes.

Mr. Swindall. Did the facility meet those financial projections?

Mr. Crane. To the best of my knowledge they did, yes, sir.

Mr. Swindall. Do you know what the profit projections were for the first year of operation?

Mr. Crane. Well, we are not making any profit because of our enormous overhead at our corporate office in Nashville; but, no, I do not. Our profit those years are 7 or 8 percent.

Mr. Swindall. At what point do your prospective figures show you are to achieve profitability?

Mr. Crane. I think our business plan has it around the first quarter of next year.

Mr. Swindall. With respect to other corporations that have run correctional facilities on a privatized basis, have you done any analysis of their recidivism rates versus the same area when it was operated by the Government?

Mr. Crane. It has been too short a period of time. Nobody wants to use the same method. The Federal Bureau of Prisons has one idea about what recidivism is and other people have others, but there is no problem with doing that as long as everybody can agree on what the standard is.

Mr. Swindall. So there is simply no data base then, substantial data base that you can make any analysis on in terms of past facilities that have been privatized?

Mr. Crane. No; that is correct.

Mr. Swindall. I yield back.

Mr. Kastenmeier. The gentleman from North Carolina.

Mr. Coble. Mr. Chairman, I had a Criminal Justice Subcommittee meeting. I apologize for my belated arrival.

I have no questions. Thank you.

Mr. Kastenmeier. Let me just pursue a couple more questions, and then we will go on to our other witnesses.

I take it one thing that ought to be considered, I suppose, is that those prison employees, guards, staff, et cetera, in addition to State training facilities are also trained at the National Institute of Corrections at Boulder, CO, even as the Bureau of Prisons' employees and staff are at Glynco, GA. I take it your private personnel will not have access to those governmental training facilities. Is that correct?

Mr. Crane. Well, first of all, not all employees are sent to Boulder, CO, not anywhere near that. I would say probably nationally no more than 5,000 people a year go through the training there, and I have been on the faculty there for a number of years and the reason for that is because they obviously could not bring them all there. So they try to train the people who come to be able to impart that stuff when they return.

For example, on the the legal issues, I wrote the curriculum with a grant with myself and one other person. They then held three

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seminars to train other people around the country to take that curriculum home and teach it.

But, no, we are not included in being able to go. We would love to be. We would not mind paying for it.

In fact, I might say that we have worked with the chamber of commerce on a proposal for it to be moved to Nashville, TN, because they are looking for a new location.

Mr. KASTENMEIER. Is it that you expect among the economies that you will operate with fewer staff at facilities than comparably would be required at a governmentally operated facility?

Mr. CRANE. No, sir. In Florida, for example, the staffing ratio is set by the State department of corrections based on the layout of the facility. Now we will, if we are building a facility, try to build it in such a way to minimize or save money by having better lines of sight and so forth, so that we do not have to have additional employees. But we have, in fact, increased the number of employees at our existing facilities because they were understaffed when we got there. We had proposed, for example, in Tennessee to also add 10 top level management positions in addition to the other security and so forth.

Mr. KASTENMEIER. Would you stop at nothing, so to speak, in terms of a challenge? For example, if it were the case tomorrow hypothetically that it would be said that, well, Marion, the maximum security Federal prison, still in lockdown, is in an impossible situation, cannot manage these violence-prone inmates, all the various groups within that particular prison setting, why don't we let the Corrections Corporation of America take over, would you accept that type of challenge?

Mr. CRANE. Yes, sir.

Mr. KASTENMEIER. You would?

Mr. CRANE. It would not be the spot I would pick particularly.

Mr. KASTENMEIER. What?

Mr. CRANE. I would not exactly go out of my way to pick Marion as a place to go, but sure, we feel comfortable that we have the expertise to do that.

Mr. KASTENMEIER. How about the Federal Medical Center at Springfield, MO, and so forth?

Mr. CRANE. That is an interesting question. We are going on contract for medical services as we move along, so we think that is a specialized area. We could do the management of it, but we would still contract the medical care.

Mr. KASTENMEIER. I appreciate the answers to the questions. There are, of course, many other questions to be asked, but at this point what I would like to do is to hear from our other two witnesses, and we would like to start with Sheriff Huggins if we may. I would be interested—I will ask questions of you, Sheriff.

Mr. HUGGINS. Thank you, Mr. Chairman, and members of the committee.

I would first like to start off on behalf of the National Sheriffs' Association thanking you for including us in this forum and giving us the opportunity to voice our concerns and opinions regarding this most timely issue.

Most of my statement or at least a great deal of my statement that you have before you has been covered in one way or another. I realize your time is of the essence and as not to be redundant I won't go through my entire statement. I would, however, like to point out a couple of things.

Mr. **Kastenmeier**. However, without objection your statement will be received, and with it you have a position paper from the National Sheriffs' Association, so your statement and that position paper will be accepted for the record.

Mr. **Huggins**. Thank you very much, sir.

I would like to make a couple of observations. I commend Mr. Crane because I thought he has done an admirable job representing his firm and the position that he has taken. However, as I sit here, I sit here in kind of amazement over a couple of things.

No. 1, most of the people whom he has talked about here today, in fact, he has been almost boastful about the fact that the management for CCA comes from people who have been former members or commissioners, I think he called them. I know Don Hutto, who is the president, was the former director of the department of corrections in my State, Virginia. The person that is running the facility in Tennessee also is a former director of the Virginia Department of Corrections, Bob Landon, and I guess kind of a question I have had of the private sector for some time is if all of these people are leaving the public sector and going to the private sector and they are saying that we can increase salaries, we can increase training, we can increase the number of teachers, we can increase the number of counselors, we can provide better food and better medical, we can reduce overcrowding, and we can pay to go to various other types of specialized training, and we can do all this for less than the public sector is doing it, how? How?

I have run the Fairfax County, VA, jail for 6 years. My jail is accredited. It is accredited not only by the American Medical Association but also by the Commission on Accreditation for Corrections and, by the way, that is one thing that needs to be corrected.

The ACA or the American Correctional Association does not accredit correctional facilities. The Commission on Accreditation for Corrections is the accrediting agency. It is a child, if you will, of the ACA, being born of the ACA but now it is a completely separate organization, having been weaned away from the ACA some years ago. So they are the ones that do the accrediting, and to do all of these things that are being promised, to cut costs and make a profit, I believe is impossible to do.

I have a 400-bed facility, soon to be a 700-bed facility. We are working at times with almost 500 inmates. The corrections part of my budget involves about $8 million, and the single largest aspect of that is personnel and training costs. How can you raise those costs? How can you raise salaries and raise training and at the same time make a profit? You cannot do all of these things, raise all of these things, and do it for less. You just cannot do it.

Now they might say they can. I do not believe that they can do it, quite frankly.

Beyond that, I think that there is a larger issue here that has to be addressed other than just corrections, because, I think, if we look down the road some 15, 20, 30, 40 years from now what next will we be privatizing? Will we have private police forces? Will we have private fire departments? Will we have private armies? Will our very national defense depend upon private armies?

In my opinion, of all of the services the Government provides to me as a citizen, and of all of the things it is responsible for, the three most important things that it is responsible for—and this is my opinion—is national defense, I think, certainly is first and foremost; second, domestic defense or, as we call it, public safety; and, third, administration of justice or the court systems.

While they might not be the three most important, I do not think anyone would disagree that they are certainly three of the most important. When you consider it in that context, should the Government evade itself or delegate one of its most important responsibilities to the private sector? I do not think that it should.

Mr. Martin Tolchin, who is a writer for the New York Times, and who, I believe, is attending this hearing today, wrote an article back in February where the private sector was quoted as saying that they could manage their facilities without public or political interference. That is the reason why corrections is in the sorry shape it is in in this country today, because we have never had a constituency.

When you stop and think about, once again, all the services that Government provides, the parks have a constituency, the National Zoo has a constituency, the police department has a constituency, the fire department has a constituency, the trash collectors have a constituency, but what constituency do the jails have?

Mr. KASTENMEIER. I have seen a lot of bumper stickers, "Support your local sheriff."

Mr. HUGGINS. But they do not say, "Support your local jail."

The sheriff does a lot of other things other than run the jail. We do not have a constituency. I am a politician. When we get up and talk about all of the issues that we have to talk about with our constituents, very, very seldom does corrections take a front burner in a discussion. We want to talk about transportation and education and law enforcement and a lot of these other types of things, but we do not talk about corrections. And it is my opinion that because of a lack of concern, because of a lack of awareness by politicians and by the public at large, that we find ourselves with a lot of the problems we have. It is my opinion that if Government stepped forward and did what they are required to do, pay a reasonable salary, provide for reasonable training, build adequate facilities, do not let them get to be 100 years old, that the public sector could do the exact same things that the private sector claims that it can do, that I think history will tell us they cannot, in fact, do.

Thank you very much.

[The statement of M. Wayne Huggins follows:]

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PRIVATIZATION OF CORRECTIONS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT OF SHERIFF M. WAYNE HUGGINS

ON BEHALF OF

NATIONAL SHERIFFS' ASSOCIATION

NOVEMBER 13, 1985

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The two most precious possessions belonging to any human being are their freedom and their life. Of the two, freedom might well indeed be the most important. For without freedom, the meaning and value of life itself is greatly diminished. Since every inmate in every correctional facility in this country has lost his most prized possession, it becomes of paramount importance that any discussion pertaining to the administration of our nation's correctional facilities be framed with this thought in mind.

One of the main arguments used by the proponents of privatization is that they can do it "cheaper". It amazes me how some people automatically assume there is a correlation between cheaper and better. I believe if we carefully analyze today's jail operations, such claims seem illogical and almost undoable. For example, two of the major expenditure areas in any law enforcement agency's budget is personnel and training. A National Sheriffs' Association's 1982 study entitled The State of Our Nation's Jails -- 1982 indicated that the average starting salary stood at $10,780. At that time, that salary was 14% less than was paid to rookie patrol officers. While the average starting salary today is probably around $13,000, I do not think that anyone would disagree with the fact that such a starting salary can only be characterized as pityful. One of the areas that correctional officials have been criticized in greatly is training. One reason we have not been able to train more diligently and more extensively is because of (1) the lack of sufficient financial resources and (2) the lack of sufficient manpower resource.

Everyone in corrections agree that additional training is beneficial and would only help us to continue to professionalize. Since salaries are already at a "bare bones" minimum, their training continues to leave a lot to be desired and any promise of cheaper operations would have to involve budget cutting in your largest expenditure areas, how can private companies legitimately operate cheaper? What caliber of employees could they attract for cheaper salaries? How highly trained could they be by reducing the training budget?

The proponents would rebound by saying they can save money in other areas by cutting red tape and unnecessary bureaucratic requirements. They suggest they can cut red tape by not going through many of our public procurement policies and that they are not bound by legislative mandates as we in the public sector are. Well this red tape, as it is referred to, is in fact policies and laws designed to protect the public dollar. Regardless of whether or not a correctional facility is run by the government or by a private company, the public dollar will be used. If the red tape is unnecessary and not fulfilling its purpose of protecting the public dollar, then it should be done away with, not circumvented.

Another area that has received considerable discussion is the legal ramifications associated with turning over a correctional facility to a private company. One claim that has been made is that the liability experienced by the jurisdiction would be reduced because the private company says it would assume some or all of the liability. While I know of no case law that would either confirm or deny this theory, I have a hard time believing it is true.

Because public safety is a responsibility of government, I believe the courts would ultimately hold government responsible for the actions of a private administrator. If my assumption is correct and local government would still incur the same level of liability, can you imagine the contract that would have to be entered into to regulate the private company operation? Can you imagine the detail that would have to be written into such a contract? Who would monitor such a contract? Obviously the locality would have to have someone monitor on a continuing basis to guarantee that every aspect was being fulfilled. Thus the locality would have to create a separate bureaucracy (incurring additional cost) just to monitor an operation that is supposed to be reducing cost.

Other obvious legal considerations would be: Should private citizens incarcerate private citizens? What about the use of force? Could private citizens employ the use of force? Could they employ the use of deadly force? These are only a few of the legal concerns. I am not a lawyer, but I can assure you that the lawyers around this country, who are so actively engaged in correctional litigation, will find dozens of other legal considerations upon which to base litigation.

In considering this issue and trying to determine how appropriate the concept of privatization might be, perhaps a broader view of more than just the correction's issue would provide some insight into this issue. It seems to me that above all other responsibilities, the three (3) most important responsibilities of government are to provide for our nation's defense; to provide for our domestic defense, also referred to as public safety; and the administration of justice. Government might be able to shed itself of some responsibilities but, in my opinion, it absolutely cannot, nor should not, shed itself of these responsibilites.

In a New York Times article in February of this year by Mr. Martin Tolchin, he wrote that private companies say they "were insulated from public pressure and free from political interference". In my opinion, this mentality provides the most important reason why jails should not be privately operated.

One reason corrections has had so many problems in the past is due to a lack of public and political participation and awareness. Only in the last ten years have the public and political sectors become actively involved and aware of our problems. This involvement and awareness has paralleled a time of professional growth and an overall upgrade in the administration of our nation's correctional facilities.

Now to suggest that this is not desirable indicates a "Judge Roy Bean" mentality toward public safety. I feel that if government were to live up to its responsibilities rather than trying to shed itself of them, many of our correctional problems would vanish.

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National Sheriffs' Association

Position Paper

POSITION ON PRIVATIZATION OF ADULT LOCAL DETENTION FACILITIES

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NATIONAL SHERIFFS' ASSOCIATION

Position On Privatization Of Adult Local Detention Facilities

On February 20-22, 1985, a number of sheriffs participated in a National Conference entitled CORRECTIONS AND THE PRIVATE SECTOR: A NATIONAL FORUM, which was sponsored by the National Institute of Justice. Of major concern to the sheriffs was Plenary Session Two: "Should A Primary Adult Correctional Facility Be Privately Managed?" This is a subject that has been discussed by special interest groups for some time and in June of 1984 at the 44th Annual NSA Conference in Hartford, Connecticut, the National Sheriffs' Association passed a resolution placing the organization on record as being opposed to the private operation of adult local detention facilities. Although a consensus of those who attended Plenary Session Two indicated confidence in the manner in which sheriffs nationwide performed their jail operations, it seems appropriate for the National Sheriffs' Association to publicly state the reasons for opposition to any proposals at the national, state, or local level designed to take away the jails from the elected sheriffs and hand them over to men and women in the private sector committed only to making profit out of the correctional operation.

The National Sheriffs' Association published The State Of Our Nation's Jails--1982 whereby 2,664 jails initially participated which equals approximately 88% of the county jails in the United States. At the end of the survey, sheriffs and jail administrators were asked to list the five (5) most serious problems in the jail in the order of their importance. The responses showed in descending order of count:

1. Personnel
2. Modernization
3. Overcrowding
4. Recreation
5. Funding

The study also revealed that 19.9% of the jails were engaged in pending lawsuits and 10.7% were under court order. It was no surprise to the sheriffs that the first four (4) serious problems were prominently featured in the fourteen (14) issues cited as grounds for the court orders. All of these issues with perhaps the exception of overcrowding are intimately connected to funding, the fifth (5) issue listed in the survey.

It is important to stress here that to the best of our knowledge that not one sheriff in the United States is in a legal position to appropriate money for his/her jail operation. This is the function of the county governing body and it is rare, indeed, to discover county politicians who give jails a high priority in the county budget. Historically, this has been the case. People incarcerated in the nation's jails have relatively little, if any, political clout with a county electorate primarily concerned with schools, roads, hospitals, and good law enforcement.

Understandably, county governing members because of legal difficulties want to dump the jail problem onto a private entrepreneur who promises to make it go away. If there was one message reiterated over and over again at the recent national forum on corrections and the private sector it was that the governing body is still legally liable for what happens in the jail whether run by an elected sheriff or a private business.

Transforming jail management from the public to the private sector can only add to the scope of the problem for the private contractor must make a profit if the operation is to survive. A logical approach for the private jail company would be to reduce personnel costs since these comprise the largest part of the jail budget. Such a move flies in the face of the fact that many local jails today are understaffed and operate with inadequately trained, motivated, and compensated personnel. The job of a jail officer is difficult. It requires special training and the physical and intellectual capacity to deal not only with "rational" criminals, but with the mentally ill and retarded, the extremely intoxicated, emotionally distraught children, and a significant proportion of people prone to suicide. Yet, the average starting salary of jail personnel stands at $10,780--14% less than that paid to rookie patrol officers. Many states neither require an educational achievement level from beginning jail officers nor mandate jail training.

We believe that the best defense against lawsuits currently plaguing the nation's jails are well trained, properly supervised staffs. State legislatures could assist the nation's sheriffs by developing training programs for jail officers in states where they do not exist and by improving upon those that do exist. The states have an unmet obligation in this respect and need to pay far more attention to personnel and training in mandating standards for local jails. Once this is done, lawsuits most assuredly will decline and the clamour for privatization will subside.

A number of jails today have overcrowded conditions and sheriffs in cooperation with other components of the criminal justice system are attempting to stem this tide. A private jail company paid a fixed amount for each prisoner held has a definite incentive to keep the jail full for as long as possible since the profit motivation is its main reason for being in corrections. We do not believe that private contractors should be permitted to make a profit from the confinement of inmates in place of the county which should perform this service for the taxpayers in a cost effective manner for no profit.

Private contractors do not have to meet the same standards which are required of government agencies such as qualifications for correctional officers, recruitment standards, states' minimum standards, zoning requirements, etc. An example is Chapter 22 of the laws of the state of New Mexico passed in 1984 which provides, among other things, the operation of jails by private contractors. Section 6 of the law (33-3-4) requires inspection twice a year by the governing bodies of the counties or municipalities. Though it is not stated in the law, the Assistant Attorney General of New Mexico explained to the audience at the recent privatization forum that the "inspectors" are really the equivalent of the grand juries which still inspect jails in some states. While full of goodwill and able to discern whether the jails are clean, these individuals are hardly on a par with trained inspectors who possess a knowledge of jail operations. This is an open invitation for the private contractor to operate an institution which is virtually unregulated and inevitably that county will find itself confronted with the same problems it sought to eliminate.

Jails by their very nature are places of low visibility. A common cliche attributed to the public on this issue is to get the criminals off the street, locked up, and out of sight. This ignores the fact that the prisoners are still members of the community with friends and relatives who still have an interest in their well being, incarcerated or not. Sheriffs who operate jails make every effort to see that they function according to the applicable law, whether state or federal. They spend a great deal of their time trying to persuade county governing boards that it is in the taxpayers' interest that the jails meet all minimum constitutional standards. Sheriffs by virtue of their mandate from the state con stitution and/or state law find themselves in the business of resolving all of the jail problems. They dare not do otherwise for the day of reckoning comes at the next election. Private contractors are not subject to community pressure since they do not stand for election and they may not attempt to solve problems, particularly if the problems require a large outlay of money. The obvious response to this, of course, is for the county to seek another contractor more sensitive to jail operations, but this overlooks the problem that getting out of a contract for improper performance or obtaining a new contractor might take an extended period which in time the problems continue to fester.

For the past fifteen years, the National Sheriffs' Association has poured a significant amount of time, resources and energy devoted to helping sheriffs improve their jail operations through such efforts as the Jail Officers' Training Program, the Jail Audit System, and a number of informative pamphlets and articles designed to keep criminal justice personnel abreast of the ever recurring changes. We believe that the sheriffs and their jail staffs have done a commendable job under less than desirable circumstances. We are unalterably opposed to taking the jails away from the sheriffs and turning them over to private organizations. We feel that counties and states in cooperation with the elected sheriffs should devote much more effort to professionalizing the jail operation. Only when this commitment is made will the jail problems begin to subside.

Mr. **Kastenmeier**. Thank you for that brief but, I think, very illuminating statement. I think you are correct in suggesting that we have to look beyond this particular—I would not call it—experiment anymore, but particular enterprise. Futurists or science fiction buffs, I suppose, could speculate that in the future we could privatize law enforcement, corporate bounty hunters, and authorize the conglomerates to have their own detention facilities and so forth. That is not unthinkable. So you, I think, are correct to generalize the question that has greater parameters than that before us.

I would be interested, Sheriff Huggins, insofar as there have been contracts from counties to private correctional authorities or companies, what is the role of the sheriff? Now, I traditionally understand the role of the sheriff, at least in Wisconsin and pretty much nationally, to be not only the chief law enforcement officer of the county but also the warden of the county jail, which may be in some jurisdictions very sizable institutions. In such jurisdictions what would then the role of the sheriff be with respect to the private operation of a county jail system?

Mr. **Huggins**. I would assume, Mr. Kastenmeier, that in the case of Fairfax County, well, perhaps we would not be the proper example, because I do not have law enforcement responsibilities. My main responsibility is the jail. We have a separate police department, but let's take Cook County, IL. That is a good example, one of the larger sheriff departments in the country where Sheriff Elrod runs a jail that has an average daily population of 7,000 to 10,000 inmates, an extremely large local jail system.

In the event that CCA were to go into Cook County, with a contract to run that facility, I would then see Sheriff Elrod's responsibilities as being nothing other than law enforcement. Certainly these are massive responsibilities, but he would no longer be responsible for corrections, but would be responsible for law enforcement, court security, and civil process.

In my case in Fairfax County, if our county were to decide to enter into a contract with a private company, my responsibilities would be diminished to court security and civil process. The corrections operation is by far my largest responsibility. It requires the greatest amount of my budget as well as my manpower allocations.

Mr. **Kastenmeier**. You would be supplanted by an employee. I do not know what such a person would be called. The director or superintendent, I suppose, at such a facility.

Let me ask you in a different area what are the positions of various correctional organizations, including correctional officers' organizations that you may be aware of nationally with respect to the question of privatization?

Mr. **Huggins**. Insofar as I know, Mr. Chairman, there are only two national organizations that have taken a position on this particular issue. The two largest corrections organizations, the National Sheriffs' Association, which you have our position, we are opposed to the idea of privatization of adult local correctional facilities; and, second, the ACA, [American Correctional Association], which I believe has in the vicinity of 17,000 members—I believe that is the most recent membership number—they have taken kind of a wait-and-see position. They are not for it; they are not against it. We do not know enough about it. Let's wait and see is their position.

Mr. **Kastenmeier**. Do you think it might be useful to the extent possible to view some of these as experimental on a comparative basis, to see whether a facility, let's say, operated by the private sector for a period of 5 or 6 years compared to a comparable facility operated by traditional governmental authority, how they would compare in terms of cost, problems, and effectiveness?

Mr. **Huggins**. I think that is the only way we are going to get the answer to this question. I feel, and I do not want to sound flippant, but I feel like I know the answer, what the answer is going to be; but there are obviously a lot of people in this country who do not know what the answer is going to be, and I think ultimately the only way we are going to find out is to have actual experience with such projects to see if they work.

There is one other aspect of privatization that really has not been touched upon here, and that has to do with private services. When you talk about privatization, I, for example, in Fairfax County have a $16 million wing to our existing facility under construction that will be completed early next year. I am not building that nor is Fairfax County building that. We have gone out and contracted with a private company to build that for us. That is a form of privatization.

Two of my neighbors, the city of Alexandria and Arlington County just across the Potomac, those sheriffs use not only contract medical but also contract food services in their jail. I went to two private contractors and asked for bids and both of them came back and said we cannot do it for what you are doing it for and as good as what you are doing it for. So we do not use them. But two of my neighboring sheriffs feel that that is the best way they can provide medical and food services, and there are many other examples of how private services are being afforded.

Our main objection is not the issue of going to the private sector to provide services but turning over the entire management of an adult correctional facility to a private company. That is where our objection really lies with the whole issue of privatization.

Mr. **Kastenmeier**. Do you think that responsibility should be retained by the Government?

Mr. **Huggins**. Absolutely. I think there are so many legal questions that are yet to be answered. One thing I think I should correct in my statement. I state in here where I talk about legal types of concerns that I was not aware of any case law that existed. Since I prepared my statement I have found case law. In a case that came out of the Southern District of Texas, *Medina* v. *O'Neill*, the court found that power to detain aliens, talking here about illegal aliens, is a Government function and private detention arrangements amounted to governmental action, bringing into play the constitutional protections.

The court went on to find that the constitutional rights of aliens were denied when INS ordered their detention but failed to insure their confinement in conditions which meet constitutional requirements.

I think what the court is saying is, yes, Government, you can go out here and retain private companies to run your correctional facilities, but it will be you that will be ultimately held responsible for what happens to those people.

Another thing that I heard was the bureaucracy that we are going to have to create to monitor these contracts. If we are going to do it, one, more efficiently, professionally and, two, to save the public's dollar, how can we do it by increasing all these things and creating all these separate bureaucracies to monitor something? When you start hiring people to monitor contracts, and I have never seen one of Mr. Crane's company's contracts, but being involved in the accreditation process I am aware of how detailed and how complex the corrections operation is, and to write a contract that would cover all of the various things that we do on a daily basis has to be a monumental task at least, and then to have someone come in and monitor, if you will, on an ongoing basis that contract to make sure that every aspect of it is being met, I cannot imagine your bureaucracy that it would develop. It would have to be an awesome undertaking.

Mr. KASTENMEIER. A good point.

I would like to yield now to the gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

Sheriff, what is your term of office? Four years?

Mr. HUGGINS. Four years, yes, sir.

Mr. COBLE. And you are in your second term?

Mr. HUGGINS. That is correct, sir.

Mr. COBLE. And the capacity of your jail is what?

Mr. HUGGINS. The design capacity—our jail opened in 1978. It was 198 when it opened. That was 186 men, 12 women. It has since been renovated 1 time, so that now the capacity is 230. That is 218 men and 12 women. And, as I mentioned, it is being renovated again to add an additional 300 general population beds, bringing the capacity up to, including special purpose beds, special management inmate beds, a total of around 600 beds.

In addition, we have funding that was approved through a bond referendum, $7 million, to authorize us to build a 100-bed medium-to-minimum security jail farm that will obviously give us an additional 100 beds and help us very much.

Mr. COBLE. Are you generally, Sheriff, at capacity?

Mr. HUGGINS. I have never been at capacity. I wish I was at capacity. I am generally at least 150 percent of capacity and have been as much as 200 to 210 percent of capacity.

Mr. COBLE. The jail is maintained by the County of Fairfax, I presume.

Mr. HUGGINS. That is correct, sir.

Mr. COBLE. Are you also assigned Federal and State inmates?

Mr. HUGGINS. Yes, we are. State inmates, kind of a metamorphosis occurs in the jail, if you will. Inmates that are arrested by the police department and are held pretrial, who are not bonded out, who go to trial and are sentenced, the moment they are sentenced and become convicted felons, they then become State inmates and will await transfer into the State system in our jail. That transfer can occur as quickly as a month and as long as 12 months in some cases. We do hold Federal prisoners for the Federal system.

Mr. COBLE. One more question, Mr. Chairman, concerning the capacity.

In response to my question, Sheriff, did you say that you are generally overcapacity?

Mr. Huggins. Yes, sir; I have a rated capacity of 230 beds. In addition, I have an additional 150 special purpose beds. That is a bed such as infirmary for an inmate who is sick, work release, classification, receiving, the area of the jail that a newly admitted inmate comes into is what we call receiving, padded cells. All of these are special purpose beds; and while it is theoretically possible to never have anyone who meets those special requirements, you are always going to have at least in our case most of those beds full, and the special purpose beds is what has provided the pressure relief valve for us.

Our average daily population midweek runs about 375 or 380, and on weekends, which is our peak periods, reaches up as high as 440 to 450.

Mr. Coble. Thank you, Sheriff.

Mr. Chairman, perhaps the statements may include this, but I would like to have some sort of comparative numbers from our two witnesses. They may well be included in your statements, but somewhere down the road I would like to have some comparative figures. The private sector can do it for *x* amount of dollars over a 7-day period versus governmental. Perhaps we can look at that at a subsequent time.

Mr. Kastenmeier. That is perhaps an appropriate question for Mr. Crane. Mr. Crane has—his company now has seven contracts.

Mr. Crane. Yes, sir.

Mr. Kastenmeier. Seven facilities. Perhaps, Mr. Crane, you could give us the figures on what those contracts involve and what the governmental authority assumed would have been the normal operating cost for those institutions. I do not know if that is possible.

Mr. Coble. I do not want to delay today's hearing, Mr. Chairman. We can do that conveniently. I would like to be able to have it.

Mr. Crane. I can very quickly tell you one, to give you a comparison. In Houston, TX, the INS was paying $34.85 to local sheriffs to house illegal aliens. When we got the contract in 1983 we agreed then to do it for $23.84, so just over $10 less.

Mr. Coble. Thank you, Mr. Chairman.

Mr. Crane. While I have the mike, let me just clarify one point. I said during my testimony that we included the cost of the monitoring in the cost of the contracts so the Government could see those additional costs that the sheriff talked about that are involved with monitoring the contract. Even with that we still are less expensive.

Mr. Kastenmeier. You heard the description by the sheriff of the sort of monitoring that might be necessary with respect to a very complex contract and concerning overall activities which presumably are very involved. Do you have any experience as to the cost of monitoring?

Mr. Crane. Yes, sir, we have monitors at all of our facilities, but we do not have anything this size. What my suggestion was is that we provide monitors at least to the same ratio as the court has provided monitors in Texas, where they have it. In Tennessee they have just one special master. In Texas they have a court appointed special master and then he, in turn, has monitors that work for him. But we put in enough money for the State to pay for the monitoring function, so that they could see that not only was the $168 million here for the operation but also here is another $20 million, $10 million, whatever the figure would be. It was not that high, by the way.

Mr. **Kastenmeier**. You pay for the monitoring, but are they employees of the corporation?

Mr. **Crane**. Oh, no, the State. We pay for them. What I am saying is that in order for the State to see the true cost of the contract we would show them what we would charge them, and we also show them what their additional costs would be to monitor the contract because that is a valid point. It does cost money to monitor the contract, so you should know what that is.

Mr. **Kastenmeier**. Thank you.

I would like to go on to our last witness. Professor Robbins, you have been very patient. You are sort of the cleanup hitter here, Professor Robbins. You have obviously studied this and can give us comments in an entirely different perspective.

Mr. **Robbins**. Thank you, Mr. Chairman.

I appreciate having been invited to testify. I request that my full statement be included in the record, so that in the time that I have I may simply summarize that statement and respond to questions.

Mr. **Kastenmeier**. Without objection.

Mr. **Robbins**. Privatization is an emerging concept that seeks to deal with many of the problems facing our prisons and jails today. But privatization obviously is not a simple matter of cost and efficiency.

This morning I would like to address some of the questions, particularly the legal questions, that are raised by privatization.

There are three fundamental advantages that are commonly put forth for privatization of corrections: first, that the private sector can build and operate correctional facilities cheaper than the public sector can, thereby reducing overcrowding; second, that the private sector can manage the facilities more efficiently; and, third, that privatization will reduce or eliminate governmental liability in suits that are brought by inmates and prison employees.

The critics to privatization respond on several fronts, with both policy and constitutional objections. First, regarding policy objections, they claim that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding, no incentive to consider alternatives to incarceration, and no incentive to deal with the broader problems of criminal justice.

The critics further assert that cost-cutting measures will run rampant, at the expense of humane treatment. For example, the director of program development of the Triad Corp., which is a multimillion-dollar Utah-based company that has been considering proposing a privately run county jail in Missoula, MT, recently stated the following: "We will hopefully make a buck at it. I am not going to kid any of you and say that we are in this for humanitarian reasons."

Privatization also raises concerns about the routine quasi-judicial decisions that affect the legal status and well-being of inmates. To what extent, for example, should a private corporation employee be allowed to use force, perhaps serious or deadly force, against a prisoner?

Another example is whether a private company employee should be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward the inmate's release.

Finally, the critics claim that the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, corrections facilities have been financed through tax-exempt general obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval, which approval is abrogated by privatization.

One recent example of the possibly egregious effects of reducing accountability and regulation is a proposal by a private firm in Pennsylvania to build an interstate protective custody facility on a toxic waste site, which it had purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said the following: "If it were a State facility, we would certainly be concerned about the grounds where the facility is located. As for a private prison, there is nothing which gives anyone authority on what to do about it."

Turning to the constitutional questions, there are two major issues concerning privatization: first, whether the acts of a private entity operating a correctional institution constitutes State action, thus allowing for liability for violation of an individual's civil rights; and, second, whether, in any event, delegation of the corrections function to a private entity is itself constitutional.

On the State action issue, there is no doubt whatsoever in my mind that State action will be held to be present in the full-scale privatization context, under either the public function test, the close-nexus test, or the State-compulsion test, each of which is outlined in my full statement.

Regarding a privately run Immigration and Naturalization Service facility in Houston, for example, a Federal district court in 1984 found what it termed "obvious State action." The U.S. Supreme Court in 1982 stated that "the relevant question is not simply whether a private group is serving a 'public function' but whether the function performed has been 'traditionally the exclusive prerogative of the state.'" Certainly this is true of the incarceration function.

As another Federal court has stated, "if the private entity were not held responsible, the State could avoid its constitutional obligations simply by delegating governmental functions to private entities."

Thus, it is clear to me that there will be no reduced liability on the part of the Government for violation of an inmate's constitutional rights.

The issue whether the delegation of the incarceration function to a private body is itself unconstitutional is much less clear cut. It is true that Congress, under the "necessary and proper" clause of the

Constitution, can delegate authority sufficient to effect its purposes. But which purposes?

Although the nondelegation doctrine has had important influence in judicial review of administrative action, a congressional delegation of power has not been declared to be unconstitutional since 1935. Nevertheless, it may be that, with a sufficiently broad delegation of a traditionally exclusive governmental function, such as incarceration, the doctrine might be used once again. It should be absolutely clear that—unlike private firefighting services or private garbage collection services, for example—private prisons and jails involve more than the simple provision of services; they provide the doing of justice. [1]

If the constitutional hurdles are overcome, a great deal is going to come down to the contract itself between the Government and the corporation. For example, what standards will govern the operation of the institution? Who will monitor the implementation of the standards? Who will be responsible for maintaining security and using force at the institution? Will the private corporation be able to refuse to accept certain inmates—such as those who have contracted AIDS? And what will happen, for example, if the company declares bankruptcy, or simply goes out of business because there is not enough profit?

Finally, let me address the hidden issue of symbolism which may be the most difficult issue of all for privatization. That is to say, apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that inmates will retain no fewer rights and privileges than they had before the transfer to private management, the question is simply this: Who should operate our Nation's prisons and jails?

In an important sense, this is really part of the constitutional delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the Government or its designee is an expression of Government policy, and therefore should not be delegated.

Perhaps every minute of every day, the inmate should know whose power is incarcerating him, just as perhaps every minute of every day the Government should know that it alone is its brother's keeper, even with all of its flaws.

I cannot help but wonder what Dostoevsky—who wrote that "the degree of civilization in a society can be judged by entering its prisons"—would have thought about privatization of corrections.

To conclude, the urgency of the need to correct the problems of corrections should not interfere with the caution that should accompany a decision to delegate to private companies one of Government's most fundamental responsibilities. We should not be misled by brash claims of people who are currently running private facilities such as the claim by one private facility operator who is reported to have said: "I offer to forfeit all of my contracts if the recidivism rate goes above 40 percent." Nor should we permit the purported benefits of prison privatization to thwart consideration of the broader problems of criminal justice. I use the term "purported benefits of prison privatization" because I do not believe that liability will be eliminated or reduced, and because there appears to be growing controversy whether even the cost would be reduced.

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[1] Ed. note. This sentence was added subsequent to the hearing.

Thank you very much. I will be happy to answer any questions.

[The statement of Ira P. Robbins follows:]

STATEMENT OF

IRA P. ROBBINS

BARNARD T. WELSH SCHOLAR AND PROFESSOR OF LAW AND JUSTICE
THE AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

CONCERNING

PRIVATIZATION OF CORRECTIONS

NOVEMBER 13, 1985

The American University
Washington College of Law
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Mr. Chairman and Members of the Subcommittee:

My name is Ira P. Robbins. I am the Barnard T. Welsh Scholar and Professor of Law and Justice at The American University, Washington College of Law, where I teach courses on Criminal Law, Prisoners' Rights, Post-Conviction Remedies, and Conflict of Laws. I am currently on leave of absence, serving as a Judicial Fellow at the Federal Judicial Center. Formerly, I was on the faculty of the University of Kansas School of Law and was Director of the Kansas Defender Project, which provides legal assistance for inmates at several institutions, including the United States Penitentiary at Leavenworth. I have also served as the Reporter on Legal Issues for the National Institute of Justice's National Forum on "Corrections and the Private Sector" (February 1985), and am currently serving as Reporter for the American Bar Association Criminal Justice Section's study on the privatization of corrections.*

I am honored to have been invited to testify on privatization of corrections before the Subcommittee. I will survey the various questions that must be addressed in a comprehensive evaluation of privatization, focusing on the legal issues. My conclusions are that: (1) the government will not be able to eliminate or reduce its liability to inmates by delegating to private entities the operation of detention or correctional facilities; (2) the caselaw provides little guidance on whether the delegation itself is constitutional; and (3) any steps toward privatization should be taken cautiously, for there are numerous policy questions that must be seriously confronted.

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* The analyses, conclusions, and points of view expressed herein are my own, and do not reflect the positions of the Federal Judicial Center, the National Institute of Justice, or the American Bar Association.

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I. Introduction and Background

Even as the public is demanding that more criminals be incarcerated and that their sentences be lengthened, the problems of America's prisons and jails continue to plague, if not overwhelm, us. More than two-thirds of the states are currently under court order to correct conditions that violate the United States Constitution's prohibition against cruel and unusual punishment. There are many important questions, but there are still no clear, satisfactory answers.

The last few years have thus witnessed diverse, controversial developments. Some, like the voluntary accreditation of correctional facilities by the Commission on Accreditation for Corrections, have begun to take root. Others, like a 1982 proposal in Congress to build an Arctic penitentiary for serious offenders,[1] have been inconsequential. Yet the number of prisoners and the cost of housing them still mount. Prison and jail populations have doubled in a decade, and -- with preventive detention, mandatory-minimum sentences, habitual-offender statutes, and the abolition of parole in some jurisdictions -- there is no relief in sight. Some states are even leasing or purchasing prison space in other states. And it is costing the taxpayers approximately $17 million a day to operate the facilities, with estimates ranging up to $60 a day per inmate. Several commentators have not so facetiously noted that we could finance college educations at less cost for all of the inmates in the country.

To reduce some of this stress on the system, a new concept has emerged: the privatization of corrections, occasionally known as "prisons for profit." The idea is to remove the operation (and sometimes the ownership) of an institution from the local, state, or federal government and turn it over to a private corporation.

At the outset, it should be emphasized that private prisons are different from the notion of private industries in prison -- Chief Justice Burger's "factories with fences" proposal[2] -- which seeks to turn prisoners into productive members of society by having them work at a decent wage and produce products or perform services that can be sold in the marketplace. (In the process, the prisoners can also pay some of the costs of their incarceration, and, we would hope, gain some self-esteem.)

Privatization is also different from the situation in which some of the services of a facility -- such as medical, food, educational, or vocational services -- are operated by private industry. Rather, the developing idea, which may turn out to be a lasting force or just a passing fad, is to have the government contract with a private company to run the total institution.

II. Purported Advantages of Privatization

This idea has sparked a major debate. Its proponents -- including not only some corrections professionals, but also major financial brokers who are advising investors to consider putting their money into private prisons -- argue that the government has been doing a dismal job in its administration of correctional institutions. Costs have soared, prisoners are coming out worse off than when they went in, and while they are in they are kept in conditions that shock the conscience, if not the stomach.

The private sector, advocates claim, can save the taxpayers money. It can build facilities faster and cheaper than the public sector can, and it can operate them more economically and more efficiently. With maximum flexibility and little or no bureaucracy, both new ideas (like testing new philosophies) and routine matters (like hiring new staff) can be implemented quickly. Overcrowding -- perhaps the major problem of corrections today -- can be reduced.

A final -- and significant -- anticipated benefit of privatization is decreased liability of the government in lawsuits that are brought by inmates and prison employees.

III. Criticisms of Privatization

The critics respond on many fronts, beginning with two major constitutional objections: (1) the mere fact that the government would no longer directly be operating the institutions cannot shift liability under the Federal Civil Rights Act, 42 U.S.C. § 1983, pursuant to which most prison-condition litigation is brought; and (2) in any event, the government does not have the power to delegate to private entities the authority for such a traditional and important governmental function. In brief, critics argue that, to be properly accountable, the government must operate its prisons and jails and be subject to liability.

As a policy matter, moreover, they claim that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), nor to consider alternatives to incarceration, nor to deal with the broader problems of criminal justice. On the contrary, the critics assert that the incentive would be to build more prisons and jails. And if they are built, we will fill them. This is a fact of correctional life: The number of jailed criminals has always risen to fill whatever space is available.

Cost-cutting measures will run rampant. Conditions of confinement will be kept to the minimum that the law requires. As a reporter for Barron's has written: "[T]he brokers, architects, builders and banks . . . will make out like bandits."[3] But questions concerning people's freedom should not be contracted out to the lowest bidder. In short, the private sector is more interested in doing well than in doing good.

Privatization also raises concerns about the routine, quasi-judicial decisions that affect the legal status and well-being of the inmates. To what extent, for example, should a private-corporation employee be allowed to use force, perhaps serious or deadly force, against a prisoner? Should an employee be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward release? An employee who is now in charge of reviewing disciplinary cases at a privately run Immigration and Naturalization Service facility in Houston recently told a New York Times reporter: "I'm the Supreme Court."[4]

Finally, the critics claim, the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, correctional facilities have been financed through tax-exempt general-obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval. Privatization abrogates this power of the people. In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E.F. Hutton underwrote a $30 million issue for private jail construction.[5] The corporation can build the institution and the government can lease it. The cost of the facility then comes out of the government's general appropriation, avoiding the politically difficult step of raising debt ceilings. Once the lease payments have fulfilled the debt, ownership of the facility shifts to the governmental body.[6] This position was recently acknowledged by Senator Alfonse D'Amato (R-N.Y.),[7] who last year proposed a bill to provide federal investment and rehabilitation tax credits and accelerated-depreciation deductions for private-prison construction.[8]

One recent example of the possibly egregious effects of reducing accountability and regulation is a proposal by a private firm in Pennsylvania to build a 720-bed medium- and maximum-security interstate protective-custody facility on a toxic-waste site, which it purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said: "If it were a state facility, we certainly would be concerned about the grounds where the facility is located. [As for a private prison, there] is nothing in our legislation which gives anyone authority on what to do."[9]

IV. Constitutional Issues

The relative advantages and disadvantages of privatization are not merely academic, for more than thirty institutions -- immigration, juvenile, work-release, and halfway-house facilities -- are now owned and operated by private groups. Further, a few of the above issues have preliminarily been litigated.

There are two major constitutional questions regarding the privatization of corrections: (1) whether the acts of a private entity operating a correctional institution constitute "state action," thus allowing for liability under 42 U.S.C. § 1983; and (2) whether, in any event, delegation of the corrections function to a private entity is itself constitutional. In this section, I shall address the caselaw pertaining to these questions.

A. State Action

When a private party, as compared with a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C. § 1983, must show that the private party was acting "under color of state law." The reason for this is fundamental. The Fifth and Fourteenth Amendments, which prohibit the government from denying federal constitutional rights and which guarantee due process of law, apply to the acts of the state and federal governments, and not to the acts of private parties or entities.[10]

The ultimate issue in determining whether a person is subject to suit for violation of an individual's constitutional rights is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.'"[11] A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[12]

Three basic tests have been used to determine "state action":[13] (1) the public-function test; (2) the close-nexus test; and (3) the state-compulsion test. State action will be held to exist if any one of these tests is satisfied. I believe that, in the private-prison context, each of these tests for state action is satisfied.

1. Public-Function Test. The case that is perhaps most directly relevant to state action in the private-prison context is Medina v. O'Neill.[14] Sixteen inmates of the privately run Houston Immigration and Naturalization Service facility who had been confined in a single, windowless, 12- by 20-foot cell that was designed to hold six persons sued the private corporation and the INS. Another issue in the case was that one private security guard, who had not been trained in the use of firearms, had been using a shotgun as a cattle prod when the gun went off, killing one inmate and seriously wounding another.

The plaintiffs claimed that they had been unconstitutionally

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deprived of life and liberty, arguing, *inter alia*, that the INS had a duty to oversee their detention and that the defendants' failure to do so constituted state action. In opposition, the federal defendants contended that at all times the plaintiffs were in the custody of the private company, and, therefore, that the problems stemming from the plaintiffs' detention arose from purely private acts. Thus, the defendants averred that there was no state action.

The Federal District Court, in 1984, rejected the defendants' argument, finding "obvious state action" on the part of both the federal defendants and the private company.[15] The court noted that, although there was no precise formula for defining state action,[16] the Supreme Court has recognized a "public function" concept, which provides that state action exists when the state delegates to private parties a power "traditionally exclusively reserved to the State."[17] As the Supreme Court recently stated in *Rendell-Baker v. Kohn*,[18] "the relevant question is not simply whether a private group is serving a 'public function' . . . , [but] whether the function performed has been 'traditionally the *exclusive* prerogative of the State."[19] The *Medina* court found that detention came squarely within this test.

More recently, on August 26, 1985, the United States Court of Appeals for the Eleventh Circuit, in *Ancata v. Prison Health Services, Inc.*,[20] addressed the question whether a private entity that was responsible for providing medical care to county jail inmates was liable, under section 1983, to the estate of a deceased

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county-jail prisoner who, following recalcitrance and improper diagnosis and treatment by doctors of the private health service, was diagnosed as having leukemia. Finding the state action issue so well settled as not to require extended discussion, the unanimous Court of Appeals panel stated:

> Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present.[21]

2. Close-Nexus Test. Another doctrine that enlightens state-action jurisprudence is the "close nexus" test. The inquiry here is "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself."[22]

A good example of the application of this test is Milonas v. Williams,[23] The plaintiffs, former students of a school for youths with behavior problems, brought an action against the school on the ground that it had used a "behavior modification" program that allegedly violated their constitutional rights. Specifically, the plaintiffs claimed that the school administrators, acting under color of state law, had caused them to be subjected to antitherapeutic and inhumane treatment, resulting in violations of the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment.

The unanimous panel of the Court of Appeals found state action, because "the state has so insinuated itself with the [school] as to be considered a joint participant in the offending actions."[24] The court made this determination after considering the following factors: many of the plaintiffs had been placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents; detailed contracts were drawn up by the school administrators and agreed to by many local school districts that placed boys at the school; there was significant state funding of tuition; and there was extensive state regulation of the educational program at the school. These facts "demonstrate[d] that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983."[25]

Application of the close-nexus test to the private-prison context should yield the same result, especially considering, among other factors, the involuntary nature of the confinement, the detailed nature of the contracts between the government and the private entities, the level of government funding,[26] and the extent of state regulation of policies and programs.[27]

3. State-Compulsion Test. Like the public-function test and the close-nexus test, the state-compulsion test can also result in improper state action, in violation of 42 U.S.C. § 1983. The inquiry is whether the state had a clear duty to provide the

services in question.

In Lombard v. Eunice Kennedy Shriver Center,[28] for example, the plaintiff -- a mentally retarded person who was a resident of a state institution that had contracted with a private organization for medical services -- sued under 42 U.S.C. § 1983, alleging that he had been denied adequate medical care, that he had been subjected to inappropriate medical treatment, and that his property had been improperly managed. The defendants contended that, because the private organization that provided all of the medical care about which the plaintiff complained was a private entity, the state could not be held accountable for the acts of the private corporation and, further, that the corporation could not be held responsible for not conforming with constitutional and statutory requirements that are applicable only to governmental entities. In short, the issue was "whether the acts and omissions of the [private entity] constitute[d] state action for purposes of the Fourteenth Amendment, and whether [it] acted 'under color of law' for the purposes of 42 U.S.C. § 1983."[29]

The court responded to these questions in the affirmative, stating that "[t]he critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions."[30] The court added:

> [I]t would be an empty formalism to treat the [private entity] as anything but the equivalent of a

> governmental agency for the purposes of 42 U.S.C. § 1983. Whether the physician is directly on the state payroll . . . or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the [private corporation], and because [that corporation] voluntarily assumed that obligation by contract, [the private entity] must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if [the private entity] were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.[31]

The foregoing statement virtually summarizes the experiences of the courts on the question whether the acts of private entities performing functions that are delegated by the state constitute state action. In the context of detention -- whether in a prison, a jail, an immigration facility, a juvenile facility, or a mental-health center -- the answer is clearly affirmative.

B. Delegation

In Ancata v. Prison Health Services,[32] -- which involved the contracting out by the county of the provision of medical care to incarcerated individuals -- the United States Court of Appeals for the Eleventh Circuit recently stated:

> Although [the private entity] has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations

> caused by the policies or customs of the [private entity]. In that sense, the county's duty is non-delegable.[33]

In other words, there is an area of overlap between state action and the propriety of a delegation of governmental powers: Government liability cannot be reduced or eliminated by delegating the governmental function to a private entity. But the non-delegation doctrine goes further than that, holding that some governmental functions may not be delegated at all. Whether the privatization of corrections would be held invalid under that doctrine is debatable; certainly the answer to that question is less clear than is the answer to the question whether such a delegation constitutes state action.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[34] Strictly interpreted, this clause prohibits Congress from delegating its legislative powers to any other institution.[35] Due to societal changes, advances, and complexities, however, a strict adherence to the doctrine of non-delegation is not possible.[36] Practicality necessitates that many of the comprehensive regulations that are required by modern life be delegated, for they are often too intricate and detailed for the direct legislative process. Thus, Congress -- under the "necessary and proper" clause of the Constitution[37] -- can "delegate authority . . . sufficient to effect its purposes."[38] But which purposes? Can the governmental functions of incarcerating, punishing, deterring, and rehabilitating criminals constitutionally be delegated to private entities?

Historically, the Supreme Court expressed an antipathy to the delegation of policymaking responsibility to private organizations.[39] Although it has been suggested that the continued vitality of this position is suspect,[40] as the doctrine has not been employed to invalidate a delegation in fifty years,[41] the doctrine at the least retains important influence by requiring that Congress provide an articulation of policy along with any delegation of authority. This requirement not only limits agency excesses, but it also facilitates the practicality of judicial review of agency action.[42] Nevertheless, it may be that, with a sufficiently broad delegation of a traditionally exclusive governmental function, the doctrine might be used once again.

In many areas, the courts have regularly allowed private entities to exercise authority that could be characterized as amounting to a deprivation of a property or liberty interest.[43] The area of family law provides a familiar example.[44] And it is also true that, even in areas that are traditionally thought of as belonging in the realm of public rather than private decision making, courts have tolerated broad delegation of lawmaking power to private bodies.[45]

There comes a point, however, where concerns about the fairness of decision making that affects the interests of individuals in what is so clearly a governmental function must outweigh the need for unchanneled exercises of expertise and claims of efficiency and reduced cost.[46] Whether that point is reached with the privatization of corrections is a very difficult question, without any good, clear, recent help from the caselaw. Even if such a delegation is constitutional, however, that does not necessarily mean that it is wise to transfer this most basic function of government -- the doing of justice -- to private hands.[47]

V. Other Important Questions to Address

Although there has been litigation on some of the issues that are likely to be raised concerning the privatization of corrections, the concept has yet to be fully tested, for there are presently no primary adult facilities in the country that are owned or operated by private bodies.

Adult correctional facilities are different from juvenile, immigration, work-release, and halfway-house facilities. Juvenile facilities, for example, typically require only minimum security, while adult institutions can range from minimum to maximum security. As a result, higher costs for security may be incurred by the private contractor. As the security level increases, so too will concern for escapes, assaults, and prison discipline. Moreover, the special problems of long-term confinement must be considered, for the length of imprisonment in an adult facility is certain to be much longer than the length of stay in a juvenile, detention, or INS facility. Further, the political climate surrounding an adult facility will usually involve stronger community opposition, since the inmates will pose more of a threat to the surrounding community. This opposition could delay, as well as increase the cost of, plans to contract with the private sector. For these reasons and others, notwithstanding the claims of proponents of privatization, it may be that lower cost is not an advantage of privatization for adult primary institutions.[48]

If the concept of privatization of corrections does take hold, however, we should move slowly and cautiously, for statutes may have to be amended or repealed, and comprehensive contracts will have to be drafted narrowly and unambiguously. Among the many questions, both general and specific, that will have to be confronted are the following:

- What standards will govern the operation of the institution?
- Who will monitor the implementation of the standards?
- Will the public still have access to the facility?
- What recourse will members of the public have if they do not approve of how the institution is operated?
- Who will be responsible for maintaining security and using force at the institution?
- Who will be responsible for maintaining security if the private personnel go on strike?

- Where will the responsibility for prison disciplinary procedures lie? For example, will private personnel be permitted involvement in quasi-judicial decisions, including not only questions concerning good-time credit, but also recommendations to parole boards?
- Will the company be able to refuse to accept certain inmates -- such as those who have contracted AIDS?
- What options will be available to the government if the corporation substantially raises its fees?
- What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, then raising the price after the government is no longer immediately able to reassume the task of operating the prisons (for example, due to a lack of adequately trained personnel)?
- What will happen if the company declares bankruptcy (for example, because of liability arising from a prison riot), or simply goes out of business because there is not enough profit?
- What safeguards will prevent a private vendors, after gaining a foothold in the corrections field, from lobbying for philosophical changes for their greater profit?

Questions like these present some hard choices -- but ones that will have to be addressed if we should seriously move toward the private ownership and operation of correctional institutions.

VI. Symbolism: The Hidden Issue

In its 1985 policy statement on privatization, the American Correctional Association began: "Government has the ultimate authority and responsibility for corrections."[49] This should be undeniable. When it enters a judgment of conviction and imposes a sentence a court exercises its authority, both actually and symbolically. Does it weaken that authority, however -- as well as the integrity of a system of justice -- when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads "Federal Bureau of Prisons" or "State Department of Corrections" he faces one that says "Acme Corrections Company"?

This symbolic question may be the most difficult policy issue of all for privatization: Who should operate our prisons and jails -- apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that prisoners and detainees will retain no fewer rights and privileges than they had before the transfer to private management? In an important sense, this is really part of the constitutional-delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy, and therefore should not be delegated.[50] I cannot help but wonder what Dostoevsky -- who wrote that "[t]he degree of civilization in a society can be judged by entering its prisons"[51] -- would have thought about privatization of corrections.

Further, just as the prisoner should perhaps be obliged to know -- day by day, minute by minute -- that he is in the custody of the state, perhaps too the state should be obliged to know -- also day by day, minute by minute -- that it alone is its brother's keeper, even with all of its flaws. To expect any less of the criminal-justice system may simply be misguided.

VII. Conclusion

We should not be swayed by brash claims, such as the one by a private-facility owner who recently told a New York Times reporter: "I offer to forfeit my contracts if the recidivism rate is greater than forty percent."[52] Nor should we be fooled by the "halo effect" -- that is, that the first few major experiments will be temporarily attractive because the private administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business. We should further be wary that private-corrections corporations may initiate advertising campaigns to make the public even more fearful of crime than it already is, in order to fill the prisons and jails. Finally, and most importantly, we should not permit the purported benefits of prison privatization to thwart, in the name of convenience, consideration of the broader, and more difficult, problems of criminal justice.

To be sure, something must be done about the sordid state of our nation's prisons and jails. The urgency of the need, however, should not interfere with the caution that must accompany a decision to delegate to private companies one of government's most basic responsibilities -- controlling the lives and living conditions of those whose freedom has been taken in the name of the

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government and the people. At the least, the debate over privatization of corrections may provide an incentive for government to perform its incarceration function better.

Referring to privatization, the Director of the National Institute of Justice recently stated: "[W]hen we have opportunities to do things more efficiently and more flexibly without in any way harming the public interest, we would be foolish not to explore them to the fullest."[53] What the public interest is, however, and where day-to-day government power should reside, are questions that are too important to leave only to criminal-justice professionals and academics.

Whatever direction we may take on privatization, the debate should be both broad and deep. For this reason, I applaud the Subcommittee's initiative in holding oversight hearings on the topic, and I shall be happy to assist the Subcommittee further in whatever way that I can.

Thank you very much for allowing me this opportunity to testify.

NOTES

1. *See* H.R. 7112, 97th Cong., 2d Sess. (1982) ("Arctic Penitentiary Act of 1982") (introduced by Rep. Leboutillier).

2. Keynote Address by Warren E. Burger, National Conference on "Factories with Fences": The Prison Industries Approach to Correctional Dilemmas (June 18, 1984), *reprinted in Prisoners and the Law* ch. 21 (I. Robbins ed. 1985).

3. Duffy, *Breaking Into Jail*, Barron's, May 14, 1984, at 20, 22.

4. N.Y. Times, Feb. 19, 1985, at A15.

5. Rosenberg, *Who Says Crime Doesn't Pay?*, Jericho, Spring 1984, at 1, 4 (1984); *see also* National Institute of Justice, *The Privatization of Corrections* 45 (1985).

6. *See* National Institute of Justice, *The Privatization of Corrections* 40-50 (1985).

7. *See* N.Y. Times, Feb. 17, 1985, at A29.

8. *See* S. 2933, 98th Cong., 2d Sess. (1984) ("Prison Construction Privatization Act of 1984"). Senator D'Amato has stated that, although he supports the private ownership of prisons, he does

not support their private operation. See N.Y. Times, Feb. 17, 1985, at A29.

9. Levine, Private Prison Planned on Toxic Waste Site, National Prison Project Journal, Fall 1985, at 10, 11.

10. See Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883).

11. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). The Supreme Court in Lugar found state action when state officers had acted jointly with a private creditor to secure the plaintiff's property by garnishment and prejudgment attachment.

12. Polk County v. Dodson, 454 U.S. 312, 317-18 (1981) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); see also Evans v. Newton, 382 U.S. 296, 299 (1966).

13. The constitutional standard for finding state action is identical to the statutory standard for determining "color of state law." See Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982).

14. 589 F. Supp. 1028 (S.D. Tex. 1984).

15. Id. at 1038.

16. See Burton v. Wilmington Park Auth., 365 U.S. 715, 722 (1961).

17. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978); see also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

18. 457 U.S. 830 (1982).

19. Id. at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

20. 769 F.2d 700 (11th Cir. 1985).

21. Id. at 703; see also Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983) (private physician hired by county to perform autopsies was acting under color of state law); Morrison v. Washington County, 700 F.2d 678 (11th Cir.) (refusing to dismiss physician employed by county from section 1983 action), cert. denied, 464 U.S. 864 (1983); Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (finding state action for private institution's acts where the City of New York had removed a child from the mother's custody and placed the child in a private child-care institution); compare Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984) (no state action found where private doctor had no supervisory or custodial

functions, whose function and obligation was solely to cure orthopedic problems, and who was not dependent on the state for funds), *cert. denied*, 105 S. Ct. 2667 (1985).

22. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

23. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

24. *Id.* at 940.

25. *Id.*; *see also* *Woodall v. Partilla*, 581 F. Supp. 1066, 1076 (N.D. Ill. 1984) (finding sufficient nexus between private food corporation and state to constitute state action); *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (finding sufficient nexus between private residential-treatment center and state), *aff'd*, 674 F.2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982); *compare* *Calvert v. Sharp*, 748 F.2d 861, 863-64 (4th Cir. 1984) (finding insufficient nexus between private doctor and state on the particular facts), *cert. denied*, 105 S. Ct. 2667 (1985).

26. On the question of the private entity's dependence on the state for funds, see *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

27. On the question whether the particular function is subject to extensive state regulation, see Blum v. Yaretsky, 457 U.S. 991, 1007-08, 1009-10 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982).

28. 556 F. Supp. 667 (D. Mass. 1983).

29. Id. at 678.

30. Id.

31. Id. at 680.

32. 769 F.2d 700 (11th Cir. 1985).

33. Id. at 705.

34. U.S. Const. art. I, § 1.

35. See K. Davis, Administrative Law § 3.4 (3d ed. 1972).

36. See B. Schwartz, Administrative Law § 2.1 (2d ed. 1984).

37. U.S. Const. art. I, § 8, cl. 18.

38. E.g., Lichter v. United States, 334 U.S. 742, 748 (1948).

39. *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also* *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

40. *See*, *e.g.*, *FPC v. New England Power Co.*, 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting); *see also* L. Tribe, *American Constitutional Law* § 5-18, at 291 (1978).

41. *See* *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

42. *See* *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946). "The delegation doctrine is alive, but not well articulated or coherently applied by the Supreme Court." Schoenbrod, *The Delegation Doctrine: Could the Court Give It Some Substance?*, 83 Mich. L. Rev. 1223, 1289 (1985). *See generally* Comment, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 1984 B.Y.U. L. Rev. 619; Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. Rev. 257 (1982).

43. *See generally* Note, *The State Courts and the Delegation of Public Authority to Private Groups*, 67 Harv. L. Rev. 1398, 1399 (1954).

44. *See*, *e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

45. *See*, *e.g.*, *Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977).

46. *See* Jaffe, *Law Making By Private Groups*, 51 Harv. L. Rev. 201 (1937).

47. *See* *infra* notes 49-51 and accompanying text.

48. *See*, *e.g.*, N.Y. Times, May 21, 1985 (reporting $200,000 in cost overruns for privately operated prison in Tennessee); *see also* American Federation of State, County, and Municipal Employees, *Policy Position on the Privatization of Correctional Facilities* (July 1985). Kenneth F. Schoen, former Commissioner of Corrections in Minnesota, has stated:

> Private operators claim they can build prisons more cheaply. While more efficient administration of construction may reduce costs, the savings are lost to the higher cost of private borrowing, as against public bonds. And, since prison construction is financed through tax shelters, the effect is to narrow the national tax base, shifting the burden of financing jails to our lower-income taxpayers.

Schoen, *Private Prison Operators*, N.Y. Times, Mar. 28, 1985, at A31.

49. American Correctional Association, *National Correctional Policy on Private Sector Involvement in Corrections* (January 1985).

50. *Cf*. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936):

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.

Id. at 311. As the executive director of the Vera Institute recently stated: "Justice is not a service, it's a condition, an idea." N.Y. Times, Sept. 17, 1985, at A17 (statement of Michael E. Smith.). This theme was echoed by the president of the Police Foundation: "Being efficient does not mean that justice will be served." *Id*. (statement of Hubert Williams). Consider finally the statement of the director of program development of Triad Corporation, a multi-million dollar Utah-based company that has been considering proposing a privately run county jail in Missoula, Montana: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons." Deseret (Utah) News, June 20-21, 1985, at B7 (statement of Jack Lyman).

51. F. Dostoevsky, *The House of the Dead* 76 (C. Garnett Trans. 1957).

52. N.Y. Times, Feb. 11, 1985, at A1.

53. 16:5 Corrections Dig. 2 (1985) (statement of James K. Stewart).

Mr. **Kastenmeier**. Thank you, Professor Robbins, for that statement.

May I ask you, Mr. Crane, whether you agree with these two legal conclusions: that Government will not be able to eliminate or reduce its liability by delegating to private enterprise and that the case law provides little guidance on whether the delegation itself is constitutional?

Mr. **Kastenmeier**. Would you agree with those two legal conclusions?

Mr. **Crane**. No, sir, not entirely, of course. I have been trying to get Ira to tell me who is making the claim around the country that if you enter into a private contract that that will eliminate the exposure to liability. That is far, far from being true and, in tact, I furnished to Ira the case cites he is citing in his work to the contrary, and I agree that you cannot eliminate the liability, and the *Houston* case that both these gentlemen referred to, *Medina* v. *O'Neill* clearly says you cannot just say here it is, we do not want to be responsible, but it says you have to see it is being run as well as Government would run it or better. That is all.

Do you reduce the exposure liability, yes, I think you reduce it in a lot of cases. One way you reduce is by putting the capital in to get the thing into a constitutional shape. Right now the prisons in Tennessee are so overcrowded they cannot take another prisoner. We can sit back and we can philosophize over who should be doing this for the next 5 years; but if we do it, it will be done in 2 years. If Government does it, it will be done at best in 5 years. So I see that reduces that exposure to liability considerably, and there are a lot of other ways, but I do not think that is what ought to sell this to the public, whether it reduces the States' exposure to liability. I think the State should be accountable, and I think they should monitor the way in which the taxpayers' money is spent.

Mr. **Kastenmeier**. Your disagreement with Professor Robbins' analysis is as to whether the private operator is vulnerable or exposed?

Mr. **Crane**. No, sir. Two things. My first disagreement is that he is saying that the private sector people are saying to Government come with us and you will have no exposure to liability. I do not know who is saying that. It is not CCA, and I certainly know better.

But in terms of the other thing, which is what of our responsibility, the same thing applies. The cases that he is citing are saying that the private people, and I agree 100 percent with him, private companies can be held liable under section 1983 for the violation of the inmate's rights in connection with a contract of this nature. There is no question that we have that exposure to liability; and if for no other reason, that is why we are going to operate it in a constitutional fashion.

Mr. **Kastenmeier**. That is maybe true. That is not what I really asked. I asked if you agreed with two conclusions: One, that the Government will not be able to eliminate or reduce its liability by delegation, and I think you said yes.

Mr. **Crane**. I would agree—I would disagree about whether they could reduce it. I think they can reduce their exposure to liability, but I do not think that they can eliminate it. I would agree with that part. What was the second question?

Mr. Kastenmeier. And whether the case law provides little guidance on whether delegation of authority itself is constitutional.

Mr. Crane. That is true. The case law does provide little guidance. I think State statutes and perhaps Federal statutes have provided a lot of guidance over the years. For example, the one I referred to with the Attorney General being able to put prisoners anyplace, whether it is government run or not. There is another example: All of these security agencies' laws where people routinely set up their own security forces essentially to guard their own property or to guard someone else's.

Mr. Kastenmeier. Professor Robbins alluded to something that appeared in the press, in the New York Times quotation: "I offer to forfeit my contracts if the recidivism rate is greater than 40 percent." Is that part of your position, that the recidivism would drop by virtue of private operation of prisons?

Mr. Crane. No, sir. I do not know who said that, but I looked at the footnote and it just said it appeared in the New York Times. It was not us. That is not our position.

Mr. Kastenmeier. I take it the source—well, the New York Times reporter was Martin Tolchin.

I was interested in, Professor Robbins, your allusion to a project that you said was being built in Pennsylvania which was a multiple-State facility, presumably for incarceration, and in the State of Pennsylvania the officials said they had no authority to deny the prospect of building such a facility on a waste dump. I can scarcely believe that. The State has no—doesn't the State have to approve? Isn't there some governmental authority that has to approve of the operation of a correctional facility?

Mr. Robbins. I do not have detailed information on this, Mr. Chairman. I read this in the fall issue of the National Prison Project Journal. I believe what the spokeswoman said was that there is no current authority in their legislation to deal with this and that they would have to enact new statutes if they were going to deal with this in the future.

Mr. Kastenmeier. Surely no one could operate a correctional facility privately except with the direct delegation of authority from the governmental entity. No one could falsely imprison, I suppose, persons except pursuant to law. Certainly you would agree to that.

Mr. Robbins. Yes, I would. I am confident that the agreement with the private company required that they clean up the toxic waste site before they went ahead and built the prison. In any event, I believe that the private company has since abandoned this site, and is now trying to sell it. So I guess that the Pennsylvania Department of Corrections has not had to look further into this.

[The following additional information was submitted by Mr. Robbins subsequent to the hearing:]

I would also like to address Mr. Crane's query regarding which proponents of privatization are claiming that it will reduce or eliminate liability on the part of the government. The answer is that many of the investment houses, such as E.F. Hutton, have been raising this point in the promotional literature that they are sending to potential private-prison investors.

Further, I would like to address an apparent—but not actual—disagreement between Mr. Crane and me. I have stated that privatization will not reduce or eliminate governmental liability. Mr. Crane, in response to your question, Mr. Chairman, has stated that the government can reduce liability, but not eliminate it. I was not discussing whether a vast infusion of *financial* resources would make prisons and jails better places. Rather, my point is that privatization does not interpose any *legal* shield to protect the government from liability. I do not believe that Mr. Crane would quarrel with that point.

Mr. **Kastenmeier**. At this point I would like to yield to my colleague from North Carolina.

Mr. **Coble**. Mr. Chairman, I think I have no questions.

Thank you, Professor, for your statement.

Mr. **Kastenmeier**. I would like to ask, Mr. Crane, we know that the disparity between the amount committed for capital construction of jail and prison facilities and that which is needed, minimally, for purposes of authorized limits or capacity for these facilities is enormous, that is to say, we knew this years ago when we had LEAA helping to build prisons. Ironically, in the past 20 years there has been a substantial Federal nexus that has been constructed in terms of the relationship of the Federal Government to State prisons and local jails partly because of LEAA and partly because of constitutional issues raised in prison and jail litigation.

But we have learned that there are billions of dollars in shortfall in terms of that which would be necessary to minimally take care of people. I gather that it is your assumption that under your contracts that you are able to provide that which is necessary from the capital construction standpoint to minimally achieve that which local authorities or State authorities are not able to achieve in terms of commitment of capital through normal methods. Is that correct?

Mr. **Crane**. Yes, it is. And I would say, for example, in our Tennessee project we are in this with Merrill Lynch and Prudential-Bache and all of their financial people feel the same way.

Mr. **Kastenmeier**. I take it, however, that you would still move somewhat cautiously with your plans. I am interested in how in Tennessee, if Tennessee is like any other State, how you are going to be able overnight to achieve standards which the entire State in all its correctional facilities have been unable presumably to attain in recent history.

Mr. **Crane**. Well, that is a very good point, and one of the things we are trying to guard against there in Tennessee is this idea, well, this is the panacea and overnight it is going to be better. We actually expect in the first year that it won't be any better or maybe even a little worse. But after that, we begin to see progress and by the end of the third year, 36 months, that we would be in a position then to request to the Commission on Accreditation to come in and begin to look at our facilities. What we are saying is with the Government trying to do it it will be at least 5 years, probably much longer. They need more money to do it and the legislature there will not increase taxes.

Mr. **Kastenmeier**. I would like to ask Professor Robbins whether he feels that the constitutional issues and protections are any different for detained undocumented aliens, because we would have the private sector getting into custodial relationships for them as well, than they would be for citizen inmates.

Mr. **Robbins**. Mr. Chairman, I do not purport to be an expert on immigration law. My general knowledge of this is that aliens would certainly be treated as persons within 42 United States Code section 1983. In fact, it is aliens who brought the suit in *Medina*, against *O'Neill* in the Southern District of Texas, ultimately winning the suit. It may be that nonalien citizens would have greater rights, but clearly detained aliens do have rights under our Constitution.

Mr. **Crane**. If I might, Mr. Chairman.

Mr. **Kastenmeier**. Yes.

Mr. **Crane**. The position that I have taken is that we would look to the case law as it relates to pretrial detainees, if we had a question, and we would always go with at least what the courts had said pretrial detainees would have.

Mr. **Kastenmeier**. Professor Robbins, and this is a general question, would there be any less protection to all inmates in a privately owned or operated facility than there would be in a State-operated facility?

Mr. **Robbins**. That depends on what you mean by protection. If we are talking about actual physical protection, it would depend on the nature of the contract between the individual facilities and the particular governmental entity, and the ways in which the contract was implemented. If you are talking about the——

Mr. **Kastenmeier**. I am talking about constitutional protection and protection of rights.

Mr. **Robbins**. Certainly we can build into a contract that the private entity would have to meet minimum constitutional standards, and we could probably build into a very detailed contract sufficient oversight and monitoring functions to make sure that minimum constitutional standards are in fact met. I think the response to this will be that, if we are contracting for minimum constitutional standards and we are dealing with a private entity that operates with a profit motive, there will never be any incentive to go beyond the minimum that the Constitution requires, whereas the States might have some incentive from time to time to go beyond that minimum. If we have written right into the contract minimum constitutional standards, then, considering the financial bottom line, that might be the extent of it, at best.

Mr. **Kastenmeier**. You said at the outset there would be constitutional issues and public policy issues. In your analysis is there any different public policy—let me ask you whether you analyze it differently in terms of public policy as an issue, as to whether the facilities are State or local or as to whether the facilities are Federal? Do you see any distinction at all in the analysis as a public policy issue?

Mr. **Robbins**. I must say that I have not addressed that question particularly. Rather, I was addressing the question of Government oversight versus private operation. Certainly the Federal statutes are different from the State statutes, and in order to have privatization in one or another State we may need to amend the State constitution or enact legislation that might not be necessary with the Federal situation to the same degree, although I must say that I disagree with Mr. Crane, regarding the Federal statutes.

It is not at all clear to me that the Federal code presently provides sufficient authority, without some amendment or new provisions, to go ahead and contract with the private sector for the operation of a total institution. The relevant citation is 18 United States Code, section 4082, subsection (b), which provides that "[t]he Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise." The important term for present purposes is "or otherwise." My own reading is that "or otherwise" means that the Federal Government may house Federal prisoners or detainees in State or county—but, nevertheless, public—institutions. It is not at all clear that this is a blanket authority to contract with the private sector.

[The following additional information was submitted by Mr. Robbins subsequent to the hearing:]

> To return to the issue of symbolism, however, I think that the public policies of the federal and state governments are slightly different. In a very real sense, the federal government sets the symbols, the ideals, for the nation as a whole. Thus, if the federal government were to move seriously toward greater use of privatization, the signals that would be sent out concerning what this says about our society would be extremely important.

Mr. **Kastenmeier**. Mr. Crane, on that point and on other similar matters, is there any current testing in litigation of your contracts recently entered into on that score or similar grounds?

Mr. **Crane**. No. There is a lot of talk, but there has been no litigation.

Mr. **Kastenmeier**. So some of these matters really currently are untested. We really do not know the answer.

Mr. **Crane**. Well, they are untested in the courts, but the concept of the Federal Government contracting for private correctional services, you know, has been around for—there are over 400 contracts between the Bureau of Prisons and private companies now to operate a variety and type of facilities, including at least one secure facility in California. But as far as I know, there has been no litigation.

Mr. **Kastenmeier**. You said there are 400 contracts for operation of lower security and partial services in correctional facilities.

Mr. **Crane**. Yes.

Mr. **Kastenmeier**. I think you also said at the outset that Correctional Corporation of America has seven contracts. It still is the largest of the four——

Mr. **Crane**. There may be some that are larger in numbers, if you are just talking about halfway houses or community treatment centers, but in terms of types of facilities, security facilities, yes, we are the largest.

Mr. **Kastenmeier**. Is it your observation—I am not going to call it competitors—but that other private enterprises which are engaged in contracts similar to your own throughout the country in normal respects operate in terms of goals and contracts?

Mr. **Crane**. Well, that has always been a possibility, and that is the reason why we have been very strong on promoting in the contract that anyone who would bid on a contract agreed to abide by American Correctional Association standards and local Federal, State decisions and so forth. We have always agreed to that, and in terms of where we would be involved with legislation, we would definitely want that type of thing on the books to protect, because it is a new industry. We do not want the industry to get a bad name by the few that might go out and do some of the things that they are alleging they are doing in these exceptions we heard about.

Mr. **Kastenmeier**. Other than halfway houses and other than partial management, that is, providing certain services only, how old are the oldest contracts for the total management of a correctional institution by any contractor in America?

Mr. **Crane**. I guess the RCA facilities. Someone else may know. A facility in Weaversville, PA, and that has been there for some time and the Eckerd Foundation operates a juvenile delinquent institution in Florida, but I really do not know. They were there before I got involved in the private corrections, so they are more than 3 years old.

Mr. **Kastenmeier**. They might be 5 or 10 years old.

Mr. **Crane**. I do not think 10, but, yes, they could be 5.

Mr. **Kastenmeier**. I want to thank all three witnesses for their contribution this morning in terms of enabling this committee to understand the move to privatization of correction facilities in America, and some of the legal issues, some of the practical problems and some of the public policy issues involved.

Mr. Crane, Sheriff Huggins, and Professor Robbins, our committee is indebted to all three of you. We may want to revisit this question at some time in the future. I think we will need more experience with it. It is very recent. Its implications, I think, potentially are very far reaching. And this is not, indeed, a minor undertaking. It is something which in year 2000 we may look at in terms of failure or it may have disappeared from the scene or, indeed, it may have become something very significant in terms of this country. To that extent at any rate we appreciate your own, in some cases, vision, your own experience in the field and your participation today.

The committee stands adjourned.

[Whereupon, at 12:10 p.m., the subcommittee adjourned to the call of the Chair.]

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PRIVATIZATION OF CORRECTIONS

TUESDAY, MARCH 18, 1986

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to call, at 1:30 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Frank, Moorhead, and Coble.

Staff present: Michael J. Remington, chief counsel; Gail Higgins Fogarty, counsel; Joseph V. Wolfe, associate counsel; and Veronica Eligan, clerical staff.

Mr. **Kastenmeier.** The subcommittee will come to order.

Without objection, the subcommittee will permit the meeting this afternoon to be covered in whole or in part by television, radio, or still photography, pursuant to rule 5 of the committee rules.

Today the subcommittee will conduct its second day of oversight hearings on the subject of privatization of corrections. The purposes of the hearing are: first, to review recent developments on the subject, particularly in the Federal Prison System; second, to examine the advantages and disadvantages of privatization and related legal, financial, administrative, and public policy questions; and, third, to explore what, if any, further action the Federal Government, including the Federal Prison System and the Congress, should take in the area.

At the first day of hearings November 13, 1985, the subcommittee heard from a representative of the Corrections Corporation of America, which operates some private correctional detention facilities; from the National Sheriff's Association, which basically opposes privatization; and from Professor Robbins, a law professor, who discussed the law and legal policy issues.

That hearing was provocative and lively and very helpful to the subcommittee as it reviewed the overall topic. Today's hearing will focus more specifically on the Federal experience, that of the Federal Bureau of Prisons. The witnesses will be Norman A. Carlson, Director of the Federal Prison System, and David Kelley, president of the Council of Prison Locals, American Federation of Government Employees.

The Bureau of Prisons has had only two contracts with the private sector for management of adult correctional institutions. The two contract institutions are a facility in LaHonda, CA, with 60 beds for low security male offenders sentenced under the Youth Corrections Act; and, two, a portion—50 to 80 beds—of a 350-bed facility in Houston, TX, in which the majority of its residents are INS detainees, operated by the Corrections Corporation of America. We were informed that in 1984 the Bureau of Prisons almost contracted with Palo Duro Detention Services, Inc., for the private operation of a Federal prison in Mineral Wells, TX. But the proposal was dropped, so we are informed, due to community opposition.

Some questions have been raised, quite apart from public policy questions, about the authority of the Bureau to contract out the operation of correctional institutions. I believe Mr. Carlson has indicated in his statement that the Bureau has statutory authority to contract with State, local, or private agencies for the care and custody of offenders, although some others have claimed that either more specific authority is necessary to contract or it would be unconstitutional to so contract out this particular public function.

So at today's hearing I hope we can review the limited Federal experience and explore these issues.

It's an especially timely hearing since last week much has been written about the District of Columbia's efforts to use a private prison in Pennsylvania. I'm not sure of what role, if any, the administration or the Department of Justice has taken on the matter. I think the Department has been consulted.

Also, last month the American Bar Association recommended that privatization of correctional facilities not proceed until complex issues are resolved. Without objection, I will place in the record correspondence from the American Bar Association to me, including that resolution.

[The correspondence follows:]

American Bar Association

[illegible]

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil
 Liberties and the Administration
 of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. [illegible]

Dear Mr. Chairman:

We [illegible] hearing [illegible] privatization of correctional facilities in the federal [illegible]

[illegible] approved by the ABA House of Delegates [illegible] including corrections [illegible] constitutional, contractual [illegible] issues.

[illegible] privatization of prisons and jails [illegible] privatization until the complex constitutional, statutory and contractual issues [illegible] are studied and resolved.

Prisons and jails are society's ultimate sanctions, short of the death penalty. We should not rush to privatization since, as a constitutional matter, government responsibility for this sanction may not be delegable, and, as a practical matter, may not be delegated. Further, until these issues are resolved, the taxpayer, who may ultimately pay the bill for any deficiencies in private operation of prisons and jails, is at risk.

GOVERNMENTAL AFFAIRS GROUP
1800 M STREET, N.W. WASHINGTON, D.C. 20036-5886 • WRITER'S DIRECT NUMBER

As you may know, significant action on privatization occurred this week in Tennessee. Despite the fact that Tennessee is the home of the Corrections Corporation of America (the leading private company in the correction field nationally), it is our understanding that the state legislature this week tabled legislation to authorize private operation of the state's major correctional facilities. Many other jurisdictions will undoubtedly be looking to the action taken by Tennessee, which has to date been viewed as a likely "pilot site" for privatization of medium and maximum security facilities.

I have attached a copy of the resolution adopted by the ABA last month, along with an explanatory report. While the report does not constitute Association policy, it contains background material which we hope will be helpful to your Subcommittee.

Please contact the Staff Director of our Criminal Justice Section, Laurie Robinson (331-2260), or me (331-2214) if we can provide further information concerning the Association's views on prison privatization.

Sincerely,

Robert D. Evans

Robert D. Evans

RDE:[illegible]

[illegible]

Attachment

Amended then Approved as American Bar Association
Policy by the ABA House of Delegates - February 1986

AMERICAN BAR ASSOCIATION

SECTION OF CRIMINAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges that jurisdictions that are considering the privatization of prisons and jails not proceed to so contract until the complex constitutional, statutory, and contractual issues are developed and resolved. "Privatization" refers to contracting for total operational responsibility for a prison or jail; it does not encompass construction or leasing physical facilities or contracting for institutional services, such as food preparation, medical care, and vocational training, in full security institutions or for operation of non-secure facilities such as half-way houses.

REPORT

I. Introduction and Background

Even as the public is demanding that more criminals be incarcerated and that their sentence be lengthened, the problems of America's prisons and jails continue to plague, if not overwhelm, us. More than two-thirds of the states are currently under court order to correct conditions that violate the United States Constitution's prohibition against cruel and unusual punishment. There are many important questions, but there are still no clear, satisfactory answers.

The last few years have thus witnessed diverse, controversial developments. Some, like the voluntary accreditation of correctional facilities by the Commission on Accreditation for Corrections, have begun to take root. Others, like a 1982 proposal in Congress to build an Arctic penitentiary for serious offenders,[1] have been inconsequential. Yet the number of prisoners and the cost of housing them still mount. Prison and jail populations have doubled in a decade,[2-3] -- with preventive detention, mandatory-minimum sentences, habitual-offender statutes, and the abolition of parole in some jurisdictions -- there is no relief in sight. Some states are even leasing or purchasing prison space in other states. And it is costing the taxpayers approximately $17 million a day to operate the facilities, with estimates ranging up to $60 a day per inmate. Several commentators have not so facetiously noted that we could finance college educations at less cost for all of the inmates in the country.

To reduce some of this stress on the system, a new concept has emerged: the privatization of corrections, occasionally known as "prisons for profit." The idea is to remove the operation (and sometimes the ownership) of an institution from the local, state, or federal government and turn it over to a private corporation.

At the outset, it should be emphasized that private prisons are different from the notion of private industries in prison -- Chief Justice Burger's "factories with fences" proposal[4] -- which seeks to turn prisoners into productive members of society by having them work at a decent wage and produce products or perform services that can be sold in the marketplace. (In the process, the prisoners can also pay some of the costs of their incarceration, and, we would hope, gain some self-esteem.)

Privatization is also different from the situation in which *some* of the services of a facility -- such as medical, food, educational, or vocational services -- are operated by private industry. Rather, the developing idea, which may turn out to be a lasting force or just a passing fad, is to have the government contract with a private company to run the *total* institution.

The Criminal Justice Section, through its Committee on Prison and Jail Problems, has been gathering information on the privatization issue since March 1984. At its November 1984 meeting, the Association's Board of Governors approved a Criminal Justice Section proposal to seek outside funding for a project to identify the major legal issues that are associated with privatization and to develop guidelines on these issues for jurisdictions contemplating privatization of their prison or jail systems. The Criminal Justice Section recognizes that many jurisdictions are proceeding toward privatization despite the fact that the complex legal issues remain unresolved. In view of this fact, the Criminal Justice Section's governing Council, at its December 7-8, 1985 meeting in San Diego, approved the foregoing resolution urging that jurisdictions not proceed to contract for private prisons or jails pending resolution of the many serious legal issues that are involved.

II. Purported Advantages of Privatization

This idea has sparked a major debate. Its proponents -- including not only some corrections professionals, but also major financial brokers who are advising investors to consider putting their money into private prisons -- argue that the government has been doing a dismal job in its administration of correctional institutions. Costs have soared, prisoners are coming out worse off than when they went in, and while they are in they are kept in conditions that shock the conscience, if not the stomach.

The private sector, advocates claim, can save the taxpayers money. It can build facilities faster and cheaper than the public sector can, and it can operate them more economically and more efficiently. With maximum flexibility and little or no bureaucracy, both new ideas (like testing new philosophies) and routine matters (like hiring new staff) can be implemented quickly. Overcrowding -- perhaps the major problem of corrections today -- can be reduced.

A final -- and significant -- anticipated benefit of privatization is decreased liability of the government in lawsuits that are brought by inmates and prison employees.

III. Criticisms of Privatization

The critics respond on many fronts, beginning with two major constitutional objections: (1) the mere fact that the government would no longer directly be operating the institutions cannot shift liability under the Federal Civil Rights Act, 42 U.S.C. § 1983, pursuant to which most prison-condition litigation is brought; and (2) in any event, the government does not have the power to delegate to private entities the authority for such a traditional and important governmental function. In brief, critics argue that, to be properly accountable, the government must operate its prisons and jails and be subject to liability.

As a policy matter, moreover, they claim that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), nor to consider alternatives to incarceration, nor to deal with the broader problems of criminal justice. On the contrary, the critics assert that the incentive would be to build more prisons and jails. And if they are built, we will fill them. This is a fact of correctional life: The number of jailed criminals has always risen to fill whatever space is available.

Cost-cutting measures will run rampant. Conditions of confinement will be kept to the minimum that the law requires. As a reporter for *Fortune* has written: "[T]he brokers, architects, builders and banks . . . will make out like bandits." But questions concerning people's freedom should not be contracted out to the lowest bidder. In short, the private sector is more interested in doing well than in doing good.

Privatization also raises concerns about the routine, quasi-judicial decisions that affect the legal status and well-being of the inmates. To what extent, for example, should a private corporation employee be allowed to use force, perhaps deadly force, against a prisoner? Should an employee be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward release? An employee who is now in charge of reviewing disciplinary cases at a privately run Immigration and Naturalization Service facility in Houston recently told a *New York Times* reporter: "I'm the Supreme Court."

Finally, the critics claim, the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, correctional facilities have been financed through tax-exempt general-obligation bonds that are backed by the tax revenues of the issuing governmental body. That debt requires voter approval. Privatization abrogates this power of the people. In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E.F. Hutton underwrote a $30 million issue for private jail construction. The corporation can build the institution and the government can lease it. The cost of the facility then comes out of the government's general appropriation, avoiding the politically difficult step of raising debt ceilings. Once the lease payments have fulfilled the debt, ownership of the facility shifts to the governmental body. This position was recently acknowledged by Senator Alfonse D'Amato (R-N.Y.), who last year proposed a bill to provide federal investment and rehabilitation tax credits and accelerated-depreciation deductions for private-prison construction.

One recent example of the possibly egregious effects of reducing accountability and regulation is a proposal by a private firm in Pennsylvania to build a 720-bed medium- and maximumsecurity interstate protective-custody facility on a toxic-waste site, which it purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said: "If it were a state facility, we certainly would be concerned about the grounds where the facility is located. [As for a private prison, there] is nothing in our legislation which gives anyone authority on what to do."[9]

IV. Constitutional Issues

The relative advantages and disadvantages of privatization are not merely academic, for more than thirty institutions -- immigration, juvenile, work-release, and halfway-house facilities -- are now owned and operated by private groups. Further, a few of the above issues have preliminarily been litigated.

There are two major constitutional questions regarding the privatization of corrections: (1) whether the acts of a private entity operating a correctional institution constitute "state action," thus allowing for liability under 42 U.S.C. § 1983; and (2) whether, in any event, delegation of the corrections function to a private entity is itself constitutional. In this section, we shall address the caselaw pertaining to these questions.

A. State Action

When a private party, as compared with a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C. § 1983, must show that the private party was acting "under color of state law." The reason for this is fundamental. The Fifth and Fourteenth Amendments, which prohibit the government from denying federal constitutional rights and which guarantee due process of law, apply to the acts of the state and federal governments, and not to the acts of private parties or entities.[10]

The ultimate issue in determining whether a person is subject to suit for violation of an individual's constitutional rights is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.'"[11] A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[12]

Three basic tests have been used to determine "state action":[13] (1) the public-function test; (2) the close-nexus test; and (3) the state-compulsion test. State action will be held to exist if any one of these tests is satisfied. We believe that, in the private-prison context, each of these tests for state action is satisfied.

1. *Public-Function Test*. The case that is perhaps most directly relevant to state action in the private-prison context is *Medina v. O'Neill*.[14] Sixteen inmates of the privately run Houston Immigration and Naturalization Service facility who had been confined in a single, windowless, 12- by 20-foot cell that was designed to hold six persons sued the private corporation and the INS. Another issue in the case was that one private security guard, who had not been trained in the use of firearms, had been using a shotgun as a cattle prod when the gun went off, killing one inmate and seriously wounding another.

The plaintiffs claimed that they had been unconstitutionally deprived of life and liberty, arguing, *inter alia*, that the INS had a duty to oversee their detention and that the defendants' failure to do so constituted state action. In opposition, the federal defendants contended that at all times the plaintiffs were in the custody of the private company, and, therefore, that the problems stemming from the plaintiffs' detention arose from purely private acts. Thus, the defendants averred that there was no state action.

The Federal District Court, in 1984, rejected the defendants' argument, finding "obvious state action" on the part of both the federal defendants and the private company.[15] The court noted that, although there was no precise formula for defining state action,[16] the Supreme Court has recognized a "public function" concept, which provides that state action exists when the state delegates to private parties a power "traditionally exclusively reserved to the State."[17] As the Supreme Court recently stated in *Rendell-Baker v. Kohn*,[18] "the relevant question is not simply whether a private group is serving a 'public function' . . . , [but] whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'"[19] The *Medina* court found that detention came squarely within this test.

More recently, on August 26, 1985, the United States Court of Appeals for the Eleventh Circuit, in *Ancata v. Prison Health Services, Inc.*,[20] addressed the question whether a private entity that was responsible in providing medical care to county jail inmates was liable, under section 1983, to the estate of a deceased county-jail prisoner who, following recalcitrance and improper diagnosis and treatment by doctors of the private health service, was diagnosed as having leukemia. Finding the state action issue so well settled as not to require extended discussion, the unanimous Court of Appeals panel stated:

> Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present.[21]

2. *Close-Nexus Test*. Another doctrine that enlightens state-action jurisprudence is the "close nexus" test. The inquiry here is "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself."[22]

A good example of the application of this test is *Milonas v. Williams*.[23] The plaintiffs, former students of a school for youths with behavior problems, brought an action against the school on the ground that it had used a "behavior modification" program that allegedly violated their constitutional rights. Specifically, the plaintiffs claimed that the school administrators, acting under color of state law, had caused them to be subjected to antitherapeutic and inhumane treatment, resulting in violations of the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment.

The unanimous panel of the Court of Appeals found state action, because "the state has so insinuated itself with the [school] as to be considered a joint participant in the offending actions."[24] The court made this determination after considering the following factors: many of the plaintiffs had been placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents; detailed contracts were drawn up by the school administrators and agreed to by many local school districts that placed boys at the school; there was significant state funding of tuition; and there was extensive state regulation of the educational program at the school. These facts "demonstrate[d] that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983."[25]

Application of the close-nexus test to the private-prison context should yield the same result, especially considering, among other factors, the involuntary nature of the confinement, the detailed nature of the contracts between the government and the private entities, the level of government funding,[26] and the extent of state regulation of policies and programs.[27]

3. State-Compulsion Test. Like the public-function test and the close-nexus test, the state-compulsion test can also result in improper state action, in violation of 42 U.S.C. § 1983. The inquiry is whether the state had a clear duty to provide the services in question.

In Lombard v. Eunice Kennedy Shriver Center,[28] for example, the plaintiff -- a mentally retarded person who was a resident of a state institution that had contracted with a private organization for medical services -- sued under 42 U.S.C. § 1983, alleging that he had been denied adequate medical care, that he had been subjected to inappropriate medical treatment, and that his property had been improperly managed. The defendants contended that, because the private organization that provided all of the medical care about which the plaintiff complained was a private entity, the state could not be held accountable for the acts of the private corporation and, further, that the corporation could not be held responsible for not conforming with constitutional and statutory requirements that are applicable only to governmental entities. In short, the issue was "whether the acts and omissions of the [private entity] constitute[d] state action for purposes of the Fourteenth Amendment, and whether [it] acted 'under color of law' for the purposes of 42 U.S.C. § 1983."[29]

The court responded to these questions in the affirmative, stating that "[t]he critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions."[30] The court added:

> [I]t would be an empty formalism to treat the [private entity] as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. § 1983. Whether the physician is directly on the state payroll . . . or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the [private corporation], and because [that corporation] voluntarily assumed that obligation by

> contract, [the private entity] must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if [the private entity] were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.[31]

The foregoing statement virtually summarizes the experiences of the courts on the question whether the acts of private entities performing functions that are delegated by the state constitute state action. In the context of detention -- whether in a prison, a jail, an immigration facility, a juvenile facility, or a mental-health center -- the answer is clearly affirmative.

F. Delegation

In Ancata v. Prison Health Services,[32] -- which involved the contracting out by the county of the provision of medical care to incarcerated individuals -- the United States Court of Appeals for the Eleventh Circuit recently stated:

> Although [the private entity] has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the [private entity]. In that sense, the county's duty is non-delegable.[33]

In other words, there is an area of overlap between state action and the propriety of a delegation of governmental powers: Government liability cannot be reduced or eliminated by delegating the governmental function to a private entity. But the non-delegation doctrine goes further than that, holding that some governmental functions may not be delegated at all. Whether the privatization of corrections would be held invalid under that doctrine is debatable; certainly the answer to that question is less clear than is the answer to the question whether such a delegation constitutes state action.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[34] Strictly interpreted, this clause prohibits Congress from delegating its legislative powers to any other institution.[35] Due to societal changes, advances, and complexities, however, a strict adherence to the doctrine of non-delegation is not possible.[36] Practicality necessitates that many of the comprehensive regulations that are required by modern life be delegated, for they are often too intricate and detailed for the direct legislative process. Thus, Congress -- under the "necessary and proper" clause of the Constitution[37] -- can "delegate authority . . . sufficient to effect its purposes."[38] But which purposes? Can the governmental functions of incarcerating, punishing, deterring, and rehabilitating criminals constitutionally be delegated to private entities?

Historically, the Supreme Court expressed an antipathy to the delegation of policymaking responsibility to private organizations.[39] Although it has been suggested that the continued vitality of this position is suspect,[40] as the doctrine has not been employed to invalidate a delegation in fifty years,[41] the doctrine at the least retains important influence by requiring that Congress provide an articulation of policy along with any delegation of authority. This requirement not only limits agency excesses, but it also facilitates the practicality of judicial review of agency action.[42] Nevertheless, it may be that, with a sufficiently broad delegation of a traditionally exclusive governmental function, the doctrine might be used once again.

In many areas, the courts have regularly allowed private entities to exercise authority that could be characterized as amounting to a deprivation of a property or liberty interest.[43] The area of family law provides a familiar example.[44] And it is also true that, even in areas that are traditionally thought of as belonging in the realm of public rather than private decision making, courts have tolerated broad delegation of lawmaking power to private bodies.[45]

There comes a point, however, where concerns about the fairness of decision making that affects the interests of individuals in what is so clearly a governmental function must outweigh the need for unchanneled exercises of expertise and claims of efficiency and reduced cost.[46] Whether that point is reached with the privatization of corrections is a very difficult question, without any good, clear, recent help from the caselaw. Even if such a delegation is constitutional, however, that does not necessarily mean that it is wise to transfer this most basic function of government -- the doing of justice -- to private hands.[47]

V. Other Important Questions to Address

Although there has been litigation on some of the issues that are likely to be raised concerning the privatization of corrections, the concept has yet to be fully tested, for there are presently no primary adult facilities in the country that are owned or operated by private bodies.

Adult correctional facilities are different from juvenile, immigration, work-release, and halfway-house facilities. Juvenile facilities, for example, typically require only minimum security, while adult institutions can range from minimum to maximum security. As a result, higher costs for security may be incurred by the private contractor. As the security level increases, so too will concern for escapes, assaults, and prison discipline. Moreover, the special problems of long-term confinement must be considered, for the length of imprisonment in an adult facility is certain to be much longer than the length of stay in a juvenile, detention, or INS facility. Further, the political climate surrounding an adult facility will usually involve stronger community opposition, since the inmates will pose more of a threat to the surrounding community. This opposition could delay, as well as increase the cost of, plans to contract with the private sector. For these reasons and others, notwithstanding the claims of proponents of privatization, it may be that lower cost is not an advantage of privatization for adult primary institutions.[48]

If the concept of privatization of corrections does take hold, however, we should move slowly and cautiously, for statutes may have to be amended or repealed, and comprehensive contracts will have to be drafted narrowly and unambiguously. Among the many questions, both general and specific, that will have to be confronted are the following:

- What standards will govern the operation of the institution?
- Who will monitor the implementation of the standards?
- Will the public still have access to the facility?
- What recourse will members of the public have if they do not approve of how the institution is operated?
- Who will be responsible for maintaining security and using force at the institution?
- Who will be responsible for maintaining security if the private personnel go on strike?
- Where will the responsibility for prison disciplinary

procedures lie? For example, will private personnel be permitted involvement in quasi-judicial decisions, including not only questions concerning good-time credit, but also recommendations to parole boards?

- Will the company be able to refuse to accept certain inmates -- such as those who have contracted AIDS?
- What options will be available to the government if the corporation substantially raises its fees?
- What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, then raising the price after the government is no longer immediately able to reassume the task of operating the prisons (for example, due to a lack of adequately trained personnel)?
- What will happen if the company declares bankruptcy (for example, because of liability arising from a prison riot), or simply goes out of business because there is not enough profit?
- What safeguards will prevent a private vendors, after gaining a foothold in the corrections field, from lobbying for philosophical changes for their greater profit?

Questions like these present some hard choices -- but ones that will have to be addressed if we should seriously move toward the private ownership and operation of correctional institutions.

VI. Symbolism: The Hidden Issue

In its 1985 policy statement on privatization, the American Correctional Association began: "Government has the ultimate authority and responsibility for corrections."[65] This should be undeniable. When it enters a judgment of conviction and imposes a sentence a court exercises its authority, both actually and symbolically. Does it weaken that authority, however -- as well as the integrity of a system of justice -- when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads "Federal Bureau of Prisons" or "State Department of Corrections" he faces one that says "Acme Corrections Company"?

This symbolic question may be the most difficult policy issue of all for privatization: Who should operate our prisons and jails

-- apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that prisoners and detainees will retain no fewer rights and privileges than they had before the transfer to private management? In an important sense, this is really part of the constitutional-delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy, and therefore should not be delegated.[30] We cannot help but wonder what Dostoevsky -- who wrote that "[t]he degree of civilization in a society can be judged by entering its prisons"[31] -- would have thought about privatization of corrections.

Further, just as the prisoner should perhaps be obliged to know -- day by day, minute by minute -- that he is in the custody of the state, perhaps too the state should be obliged to know -- also day by day, minute by minute -- that it alone is its brother's keeper, even with all of its flaws. To expect any less of the criminal-justice system may simply be misguided.

VII. Conclusion

We should not be swayed by brash claims, such as the one by a private-facility owner who recently told a New York Times reporter: "I offer to forfeit my contracts if the recidivism rate is greater than forty percent."[32] Nor should we be fooled by the "halo effect" -- that is, that the first few major experiments will be temporarily attractive because the private administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business. We should further be wary that private-corrections corporations may initiate advertising campaigns to make the public even more fearful of crime than it already is, in order to fill the prisons and jails. Finally, and most importantly, we should not permit the purported benefits of prison privatization to thwart, in the name of convenience, consideration of the broader, and more difficult, problems of criminal justice.

To be sure, something must be done about the sordid state of our nation's prisons and jails. The urgency of the need, however, should not interfere with the caution that must accompany a decision to delegate to private companies one of government's most basic responsibilities -- controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people. At the least, the debate over privatization of corrections may provide an incentive for government to perform its incarceration function better.

Referring to privatization, the Director of the National Institute of Justice recently stated: "[W]hen we have opportunities to do things more efficiently and more flexibly without in any way harming the public interest, we would be foolish not to explore them to the fullest."[53] What the public interest is, however, and where day-to-day government power should reside, are questions that are too important to leave only to criminal-justice professionals and academics. Whatever direction we may take on privatization, the debate should be both broad and deep.

Paul B. Johnson
Chairperson

December 10, 1985

NOTES

1. *See* H.R. 7112, 97th Cong., 2d Sess. (1982) ("Arctic Penitentiary Act of 1982") (introduced by Rep. Leboutillier).

2. Keynote Address by Warren E. Burger, National Conference on "Factories with Fences": The Prison Industries Approach to Correctional Dilemmas (June 18, 1984), *reprinted in Prisoners and the Law* ch. 21 (I. Robbins ed. 1985).

3. Duffy, *Breaking Into Jail*, Barron's, May 14, 1984, at 20, 22.

4. N.Y. Times, Feb. 19, 1985, at A15.

5. Rosenberg, *Who Says Crime Doesn't Pay?*, Jericho, Spring 1984, at 1, 4 (1984); *see also* National Institute of Justice, *The Privatization of Corrections* 45 (1985).

6. *See* National Institute of Justice, *The Privatization of Corrections* 40-50 (1985).

7. *See* N.Y. Times, Feb. 17, 1985, at A29.

8. *See* S. 2933, 98th Cong., 2d Sess. (1984) ("Prison Construction Privatization Act of 1984"). Senator D'Amato has stated that, although he supports the private ownership of prisons, he does not support their private operation. *See* N.Y. Times, Feb. 17, 1985, at A29.

9. Levine, *Private Prison Planned on Toxic Waste Site*, National Prison Project Journal, Fall 1985, at 10, 11.

10. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

11. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The Supreme Court in *Lugar* found state action when state officers had acted jointly with a private creditor to secure the plaintiff's property by garnishment and prejudgment attachment.

12. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Evans v. Newton*, 382 U.S. 296, 299 (1966).

13. The constitutional standard for finding state action is

identical to the statutory standard for determining "color of state law." *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

14. 589 F. Supp. 1028 (S.D. Tex. 1984).

15. *Id.* at 1038.

16. *See* *Burton v. Wilmington Park Auth.*, 365 U.S. 715, 722 (1961).

17. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978); *see also* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

18. 457 U.S. 830 (1982).

19. *Id.* at 842 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

20. 769 F.2d 700 (11th Cir. 1985).

21. *Id.* at 703; *see also* *Lawyer v. Kernodle*, 721 F.2d 632 (8th Cir. 1983) (private physician hired by county to perform autopsies was acting under color of state law); *Morrison v. Washington County*, 700 F.2d 678 (11th Cir.) (refusing to dismiss physician employed by county from section 1983 action), *cert. denied*, 464 U.S. 864 (1983); *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974) (finding state action for private institution's acts where the City of New York had removed a child from the mother's custody and placed the child in a private child-care institution); *compare* *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984) (no state action found where private doctor had no supervisory or custodial functions, whose function and obligation was solely to cure orthopedic problems, and who was not dependent on the state for funds), *cert. denied*, 105 S. Ct. 2667 (1985).

22. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

23. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

24. *Id.* at 940.

25. *Id.*; *see also* *Woodall v. Partilla*, 581 F. Supp. 1066, 1076 (N.D. Ill. 1984) (finding sufficient nexus between private food corporation and state to constitute state action); *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp.

1233, 1250 (W.D. Ky. 1980) (finding sufficient nexus between private residential-treatment center and state), *aff'd*, 674 F.2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982); *compare Calvert v. Sharp*, 748 F.2d 861, 863-64 (4th Cir. 1984) (finding insufficient nexus between private doctor and state on the particular facts), *cert. denied*, 105 S. Ct. 2667 (1985).

26. On the question of the private entity's dependence on the state for funds, see *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

27. On the question whether the particular function is subject to extensive state regulation, see *Blum v. Yaretsky*, 457 U.S. 991, 1007-08, 1009-10 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982).

28. 556 F. Supp. 667 (D. Mass. 1983).

29. *Id.* at 678.

30. *Id.*

31. *Id.* at 680.

32. 769 F.2d 700 (11th Cir. 1985).

33. *Id.* at 705.

34. U.S. Const. art. I, § 1.

35. *See* K. Davis, *Administrative Law* § 3.4 (3d ed. 1972).

36. *See* B. Schwartz, *Administrative Law* § 2.1 (2d ed. 1984).

37. U.S. Const. art. I, § 8, cl. 18.

38. *E.g.*, *Lichter v. United States*, 334 U.S. 742, 748 (1948).

39. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

40. *See, e.g.*, *FPC v. New England Power Co.*, 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting); *see also* L. Tribe, *American Constitutional Law* § 5-18, at 291 (1978).

41. *See A.L.A. Schechter Poultry Corp v. United States*, 295 U.S.

495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

42. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946). "The delegation doctrine is alive, but not well articulated or coherently applied by the Supreme Court." Schoenbrod, *The Delegation Doctrine: Could the Court Give It Some Substance?*, 83 Mich. L. Rev. 1223, 1289 (1985). *See generally* Comment, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 1984 B.Y.U. L. Rev. 619; Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. Rev. 257 (1982).

43. *See generally* Note, *The State Courts and the Delegation of Public Authority to Private Groups*, 67 Harv. L. Rev. 1398, 1399 (1954).

44. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

45. *See, e.g.*, *Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977).

46. *See* Jaffe, *Law Making By Private Groups*, 51 Harv. L. Rev. 201 (1937).

47. *See infra* notes 49-51 and accompanying text.

48. *See, e.g.*, N.Y. Times, May 21, 1985 (reporting $200,000 in cost overruns for privately operated prison in Tennessee); *see also* American Federation of State, County, and Municipal Employees, *Policy Position on the Privatization of Correctional Facilities* (July 1985). Kenneth F. Schoen, former Commissioner of Corrections in Minnesota, has stated:

> Private operators claim they can build prisons more cheaply. While more efficient administration of construction may reduce costs, the savings are lost to the higher cost of private borrowing, as against public bonds. And, since prison construction is financed through tax shelters, the effect is to narrow the national tax base, shifting the burden of financing jails to our lower-income taxpayers.

Schoen, *Private Prison Operators*, N.Y. Times, Mar. 28, 1985, at A31.

49. American Correctional Association, *National Correctional Policy on Private Sector Involvement in Corrections* (January

1985).

50. Cf. Carter v. Carter Coal Co., 298 U.S. 238 (1936):

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.

Id. at 311. As the executive director of the Vera Institute recently stated: "Justice is not a service, it's a condition, an idea." N.Y. Times, Sept. 17, 1985, at A17 (statement of Michael E. Smith.). This theme was echoed by the president of the Police Foundation: "Being efficient does not mean that justice will be served." Id. (statement of Hubert Williams). Consider finally the statement of the director of program development of Triad Corporation, a multi-million dollar Utah-based company that has been considering proposing a privately run county jail in Missoula, Montana: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons." Deseret (Utah) News, June 20-21, 1985, at B7 (statement of Jack Lyman).

51. F. Dostoevsky, The House of the Dead 76 (C. Garnett Trans. 1957).

52. N.Y. Times, Feb. 11, 1985, at A1.

53. 16:5 Corrections Dig. 2 (1985) (statement of James K. Stewart).

Mr. KASTENMEIER. Now I'd like to greet, if I may, our first witness, Norman A. Carlson, the Director of the Federal Bureau of Prisons.

Over the years, the subcommittee has worked closely with Mr. Carlson, hopefully to improve the Federal Prison System. We have a great deal of respect for him. He has indeed one of the most difficult jobs in the country.

Welcome, Mr. Carlson.

STATEMENT OF NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ACCOMPANIED BY WADE B. HOUK, ASSISTANT DIRECTOR; AND J. MICHAEL QUINLAN, DEPUTY DIRECTOR

Mr. CARLSON. Thank you, Mr. Chairman and members of the committee.

Let me introduce my two colleagues. On my right is Wade Houk, Assistant Director of the Bureau of Prisons, and on my left is the newly appointed Deputy Director, Mike Quinlan. Mr. Quinlan served as my executive assistant for 3 years, was the superintendent of the Federal Prison Camp at Eglin Air Force Base in Florida, and following that was warden at the Federal Correctional Institution in Otisville, NY.

Mr. KASTENMEIER. Well, we greet you all, and we commend you and trust you will do a good job in your new capacity, Mr. Quinlan.

Mr. QUINLAN. Thank you, Mr. Chairman.

Mr. CARLSON. Mr. Chairman, as evidenced by this hearing, the second in less than 6 months on this topic, there is a high degree of interest in the area of privatization of corrections.

The term "privatization" when used in reference to corrections has come to describe three separate and distinct concepts. One is the use of private capital resources in the construction of facilities. This approach generally involves a lease-back arrangement where the public sector leases the facility while continuing to operate it with public sector employees.

Second, privatization has referred to the use of private companies to provide both halfway house type programs for inmates preparing to return to the community and ancillary support services inside Government-owned and operated facilities.

Since 1981, the Bureau of Prisons has relied solely on the private sector to provide prerelease housing through its community treatment center programs. We presently contract for 330 community treatment centers, housing over 3,000 Federal inmates at a cost of over $29 million annually. The average cost at these facilities is a little over $31 per inmate per day versus the average of $39.50 per day at other Bureau of Prisons institutions.

The Bureau also has experience in contracting for services in the areas of education, food service, medical and psychological services, as well as some consultant and service contracts in Federal Prison Industries.

We have used these services when we believe it is to the Government's advantage to do so. Cost is not the sole criterion used to select which services should be performed by the private sector. The use of contract services is beneficial in terms of flexibility in controlling a rapidly fluctuating inmate population and in providing specialized expertise necessary to respond to certain needs.

Finally, the term "privatization" is increasingly being used to refer to the management and operation of entire facilities by private corporations. While this subject is a topic of debate, there is no major adult medium or maximum security prison currently operating in this manner. Consequently, all evidence regarding this topic must be generalized from programs such as juvenile detention facilities or more limited adult experiences, such as local jails and lower security facilities.

The Bureau of Prisons has had two experiences in privatization which were not prerelease or halfway house contacts. One was at LaHonda, CA, where we contracted with a private sector firm for the operation of a 60-bed facility to house Youth Corrections Act offenders requiring limited security and supervision.

The repeal of the Youth Corrections Act in 1984 by the Congress has reduced and will eliminate the Youth Corrections Act programs. The LaHonda contract expired in January of this year as the youthful population of that institution declined to the point where it could be housed entirely at regular Bureau facilities.

The cost per day at LaHonda was approximately $92 per inmate, including contract monitoring costs incurred by the Bureau of Prisons. Comparable cost for the Bureau's three other Youth Corrections Act facilities was approximately $55 per inmate day during this same time period.

Contracting to house these offenders gave us the flexibility to handle population increases without acquiring permanent spaces allowing us to respond to the population reduction in a cost-effective manner.

The other contracting experience of the Bureau of Prisons is the utilization of a private facility in Houston under a contract by the Immigration and Naturalization Service. We have used this facility for 60 to 80 sentenced illegal aliens who are processed by the Immigration Service for deportation following completion of their sentences.

Both of these contracts have been monitored closely by the Bureau, and our experience with them has been essentially positive.

These facilities were used to augment and supplement the Bureau's basic resources. Contract resources were used to house minimum security inmates with special needs.

There are several important issues which remain to be resolved before considering a wider use of contracts as a primary alternative for housing the Federal inmate population. These include legal, cost, quality, and philosophical issues. While these issues are relevant at all jurisdictional levels, I will attempt to address their significance in the Federal system.

There are a number of legal issues with regard to the privatization in Federal corrections. One of the questions is legal authority to contract for the entire facility. Although I raised some question in this regard when I testified before your subcommittee in March 1985, our general counsel has advised me that we currently have the authority to contract for the management of an entire facility under 18 United States Code, section 4082. This statute allows the

Attorney General to designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise.

Another major legal issue is an inmate's right to bring suit against the Government for violations of conditions of confinement by private sector concerns. Other issues which may come to the forefront as privatization develops revolve around the law enforcement functions performed by our personnel, such as the use of weapons in emergency situations and the investigation and discipline of inmate misconduct.

Finally, Mr. Chairman, there are issues with respect to the case of contractor insolvency or labor actions such as strikes against the contracting corporation.

As an administrator and not a lawyer, I am not prepared to offer any conclusions on these legal issues. We are working with the Department's Civil Division and the Office of Legal Counsel to analyze these concerns. Because of these issues, we are proceeding cautiously on privatization in corrections at the Federal level.

The issues of the cost and quality of correctional services are extremely complex. We have doubts about cost comparisons between private and public sector confinement.

Several months ago I recall reading an article which compared per capita costs in a single private sector, lower security facility with the Federal prison system's average cost. This is a very misleading comparison.

Obviously, maintaining maximum security U.S. penitentiaries and other specialized facilities such as the Federal Correctional Institution at Butner, NC; the Medical Center for Federal Prisoners at Springfield, MO; and the Federal Medical Center at Rochester, MN, is significantly more expensive than maintaining lower security institutions.

Private corporations anxious to develop a reputation may keep their costs low in order to develop expanded relationships with correctional agencies. We have encountered situations in our community treatment center program where private corporations have initially underbid traditional nonprofit organizations, such as the Salvation Army and Volunteers of America, and increased the cost of the service after the competition was withdrawn from the marketplace. Again, caution and the test of time are warranted in the area of cost comparisons.

Quality is also difficult to measure and compare for correctional services. In a general sense, quality is the effectiveness of security, the provision of programs to inmates, and the delivery of support services such as food and buildings and grounds maintenance.

Our findings indicate that privatization efforts to date have been generally successful but an increase in the quality of correctional services is not achieved through the use of contract facilities.

We have also heard highly suspect claims from potential contractors of guarantees of reduction in recidivism rates. I am not aware of any evidence to support such claims.

Mr. Chairman, if I had to select a single principle most responsible for quality and cost effectiveness, it is the development of knowledge and professionalism through training and staff development. The Bureau has been able to maintain high levels of professionalism and skill among its employees. In evaluating the opportunities for privatization of corrections, we must be careful that the concern with profit does not limit a commitment to the long-term development of line staff. We must be wary of overly simplistic claims of improved cost and/or quality of services by some private companies.

There are some core policy issues that should be considered along with the pragmatic issues I have outlined above. Is corrections a suitable activity for privatization? Imprisonment in a Federal institution currently represents the most serious sanction available in response to a violation of Federal law. The responsibility for administering this sanction carries with it duties which often go far beyond the issue of cost efficiency.

While there is no question that the private sector has a place in the future of corrections in this country, I believe that more experience needs to be gained before we can determine the most promising opportunities to experiment with privatization. It is crucial that we move cautiously in this area, particularly with respect to higher security institutions.

To date, we have had generally successful relationships with private correctional providers in those areas where specialized services or flexible responses are necessary.

We will continue to pursue contracts in these and other kinds of lower security institutions according to our judgment as to their effectiveness. We will continue to monitor carefully and with interest other jurisdictions' experiences as they develop and will continue to monitor the cost between Government and private operations.

That concludes my statement, Mr. Chairman. I will be pleased to answer any questions you or your colleagues may have.

[The statement of Mr. Carlson follows:]

Department of Justice

STATEMENT

OF

NORMAN A. CARLSON
DIRECTOR, FEDERAL BUREAU OF PRISONS

BEFORE

THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

PRISON PRIVATIZATION

ON

MARCH 18, 1986

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you to discuss my views regarding the Federal Bureau of Prisons' relationship with the private sector.

INTRODUCTION

As evidenced by this hearing, the second in less than six months on this topic, there is a high degree of interest in the area of privatization of corrections.

The term "privatization" when used in reference to corrections has come to describe three seperate and somewhat distinct concepts. One is the use of private venture capital resources in the construction of facilities. This approach generally involves a lease-back arrangement where the public sector leases the facility, either with or without the option to buy, while continuing to operate it with public sector employees.

Secondly, privatization has referred to the use of private companies to provide both "halfway house" types of programs for inmates preparing to return to the community, and ancillary support services inside the confines of government owned and operated facilities. Since 1981, the Bureau has relied solely on the private sector to provide pre-release housing through its Community

Treatment Center program. We presently contract for 330 Community Treatment Centers, housing over 3,000 Federal inmates at a cost of over $29 million. The average cost at these facilities is a little over $31 per inmate, per day, versus an average of approximately $39.50 at Bureau of Prisons institutions. The Bureau also has experience in contracting for selected services in the areas of education, food service, medical and psychology services, as well as some consultant and service contracts in Federal Prison Industries.

The Bureau of Prisons has typically taken advantage of the use of the private sector to provide these services when we believe it is to the Government's advantage to do so. Cost is not the sole criteria used to select which services should be performed by the private sector. Usually, the use of contract services is beneficial in terms of flexibility in controlling a rapidly fluctuating inmate population or in providing specialized expertise necessary to respond to certain needs.

Finally, the term privatization is increasingly being used to refer to the management and operation of entire facilities by private corporations. While this subject is a topic of debate, there is no major adult medium or maximum security prison currently operating in this fashion. Consequently, all current evidence regarding this topic must be generalized from other programs such as juvenile detention facilities or more limited adult experiences such as local jails and lower security detention facilities.

I would like to focus my remarks today primarily on this final use of the term. I will first describe our very limited experience in contracting for regular facilities for sentenced offenders.

THE BUREAU OF PRISONS' EXPERIENCE

The Bureau of Prisons has had two significant experiences which were not pre-release or halfway house type situations. One of these was at LaHonda, California where the Bureau contracted with a private sector firm for the operation of a 60-bed facility used to house Youth Corrections Act offenders who require limited security and supervision. The repeal of the Youth Corrections Act in 1984 is having the effect of reducing and eventually eliminating the YCA program. The LaHonda contract expired in January of this year. The YCA average daily population had by then declined to the point where it could be housed entirely at Bureau facilities. The inmate per capita cost at LaHonda was approximately $92 per day, including contract monitoring costs incurred by the Bureau. Comparable cost in the Bureau's three existing YCA facilities was approximately $55 per inmate during the same time period. Contracting to house these offenders gave us the flexibility to handle our population without acquiring additional permanent space. This allowed us to respond to the YCA population reduction in the most cost-effective way.

The other contracting experience is the utilization of a Houston, Texas private facility under contract by the Immigration and Naturalization Service. We have used this facility for 60-80 sentenced illegal aliens who are then processed by the INS for deportation following completion of their sentences.

In both cases, the contracts have been monitored closely. I personally visited the LaHonda facility, and our South Central Regional Director visited the Houston facility. Experience with these contracts was essentially positive.

It should be noted that these facilities were used to augment and supplement the Bureau's basic resources. In both cases, contract resources were used to house low security inmates with specialized needs.

There are several important issues which remain to be resolved before considering the wide use of contracts as a primary alternative for housing the typical Federal adult inmate population. These include legal, cost, quality, and philosophical issues. While these issues are relevant at all jurisdictional levels, I will attempt to address their significance in the Federal system.

LEGAL

There are a number of legal issues with regard to privatization in Federal corrections. One is the question of legal authority to contract for an entire facility. Although I raised some question in this regard when I testified before this subcommittee in March of 1985, our General Counsel advises me that we currently have the necessary authority to contract for the management of an entire facility under 18 USC 4082. This law allows the Attorney General to designate as a place of confinement "any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise...".

Another major legal issue is an inmate's right to bring suit against the government for violations of conditions of confinement by private concerns. Other issues which may come to the forefront as privatization develops revolve around the law enforcement functions performed by Bureau of Prisons personnel, such as the use of weapons in emergency situations and the investigation and discipline of inmate misconduct. Finally, there are issues with respect to the case of contractor insolvency or labor actions such as strikes against the contracting corporation.

As an administrator and not a lawyer, I am not prepared to offer any conclusions on these legal issues today. We are working with the Civil Division and the Office of Legal Counsel to analyze these concerns. But because of these issues, we are proceeding cautiously on privatization in corrections.

COST AND QUALITY

The issues of the cost and the quality of correctional services are extremely complex. We have doubts about cost comparisons between private and public sector confinement. Several months ago, I remember reading an article which compared per capita costs in a single private sector, lower security facility with the Federal Bureau of Prisons' system-wide average cost. This can be a very misleading comparison. Obviously, maintaining maximum security U.S. Penitentiaries and other specialized facilities such as the Federal Correctional Institution at Butner, North Carolina, the U.S. Medical Center for Federal Prisoners at Springfield, Missouri and the Federal Medical Center at Rochester, Minnesota is significantly more expensive than maintaining lower security institutions. Since all contracting to date has been done at the lower security levels, comparing existing contracts with average correctional system figures is analogous to comparing apples and oranges. The more appropriate comparison would be to existing lower security institutions. Additionally, regardless of the degree of use of the private sector, there is still need for governmental policy making and contract monitoring functions. These costs are often included only in the public sector cost estimates.

Also, quite understandably, private corporations anxious to develop a reputation may keep their costs low in order to develop expanded relationships with correctional agencies. We have experienced situations in our Community Treatment Center program where private, for-profit correctional corporations have initially underbid traditional non-profit organizations such as the Salvation Army and Volunteers of America, and increased the cost of the service after the competition has withdrawn from the market. Again, caution and the test of time are warranted in the area of cost comparisons.

Quality is also very difficult to measure and compare for correctional services. In a general sense, quality is the effectiveness of security, the provision of programs to inmates, and the delivery of support services such as food service and buildings and grounds maintenance. Our review indicates that the privatization efforts to date have been generally successful, but that we do not achieve an increase in quality of correctional services through the use of contract facilities. Private sector competency could, however, be assessed through a series of cost comparisons under OMB Circular A-76. We have heard highly suspect claims from potential contractors of guarantees of reductions in recidivism rates. I am not aware of any evidence to support these claims.

Mr. Chairman, if I had to pick a single principle most responsible for quality and cost effectiveness, it is the development of knowledge and professionalism through training and attention to line staff development. The Bureau of Prisons has been able to maintain high levels of professionalism and skill among its employees. In evaluating the possible opportunities for privatization of corrections, we must be careful that the contractor's concern with profit does not limit a commitment to the long term development of line staff. While there is certainly much potential to explore innovative techniques with the free enterprise approach to corrections, we must be wary of overly simplistic claims of improved cost and/or quality of services by some private companies. These claims need to be carefully evaluated.

There are some core policy issues that should be considered along with the pragmatic issues outlined here. Is corrections a suitable activity for privatization? Imprisonment in a Federal institution currently represents the most serious sanction available in response to a violation of Federal law. The responsibility for administering this sanction carries with it duties which often go beyond the issue of cost efficiency. These issues, including the classification and control of inmates, are not encountered in other areas of the government's contracting out for services such as solid waste management or janitorial services.

FUTURE DIRECTIONS

While there is no question that the private sector has a place in the future of corrections in this country, I believe that more experience needs to be gained before we can determine the most promising opportunities to experiment with privatization. It is crucial that we move cautiously in this area, particularly with respect to higher security institutions.

To date, we have had generally successful relationships with private correctional providers in those areas where highly specialized services or flexible responses are necessary with specialized and generally lower security categories of inmates. Examples include our experiences with sentenced aliens and Youth Corrections Act offenders, as well as our more limited contractual relationships for Community Treatment Centers and selected ancillary support services.

We will continue to pursue contracts in these and other kinds of lower security situations according to our judgment as to their effectiveness. We will continue to monitor, carefully and with interest, other jurisdictions' practical, legal, and philisophical experiences as they develop and will continue to monitor the cost between government and private operations.

That concludes my formal statement, Mr. Chairman. I would be pleased to answer any questions you or your colleagues may have.

Mr. **Kastenmeier**. Thank you very much, Mr. Carlson.

You indicate that you have been advised that you currently have authority to contract for the management of an entire facility, as a matter of fact. Do you have a written opinion on that, or is that merely sort of an oral assurance given to you by your legal counsel?

Mr. **Carlson**. We do not have a formal written opinion but I have discussed it with our general counsel. I will, however, supply for the record his comments, if you would like to see them.

Mr. **Kastenmeier**. Yes. It's not that I necessarily take exception to them. However, since this is an important issue, it seems to me that the opinion should be formally in writing so that we can work from the same premise in examining the opinion.

[The opinion follows:]

BEST COPY AVAILABLE

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

May 7, 1986

Honorable Robert Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

During my recent testimony before your subcommittee, I indicated I could provide the opinion given by my General Counsel, concerning the authority of the Bureau of Prisons to contract for placement of federal inmates in a privately operated facility.

Enclosed is a memorandum dated June 10, 1983. It sets out the opinion of Mr. Cripe on this issue.

Sincerely,

Norman A. Carlson

NORMAN A. CARLSON
Director

Encl.

June 10, 1983

Clair A. Cripe
General Counsel

Authority to Contract with Private Institutions for Placement of Federal Prisoners

Norman A. Carlson
Director

South Central Regional Office staff have proposed the use of a detention center which will be privately operated. The legal issue is whether there is authority to contract with a private institution, such as the one in Amarillo, for individuals committed to the Attorney General's custody. Federal procurement law principles generally allow a federal agency to carry out its duties using contracts, unless there are specific statutory restrictions against such use. R. Nash & J. Cibinic, Federal Procurement Law, 5 (1977).

Some difficulty arises from the fact that 18 USC 4002, the one section in the Code which explicitly deals with contracting for placement of federal adult prisoners, is entitled "Federal Prisoners in State Institutions," and refers to contracting with "the proper authorities of any State, Territory, or political subdivision thereof," but is silent on contracting with private facilities.

On the other hand, 18 USC 4082 allows the Attorney General to designate as a place of confinement "any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise ..." That is, Section 4082 appears to authorize the Attorney General to designate more broadly than he is given contract authority. We do not think that it is reasonable to read Section 4082 more broadly than Section 4002. This is so, especially in view of the fact that the only way in which designations to non-federal institutions can be made, at least where the inmate is not serving a state sentence in the non-federal institution, is by contract.

The legislative history of Public Law 89-176, which amends §4082, broadens the scope of both §4082 and §4002. The key part of the legislative history is found in Sen. Rep. 613 (1965 USCANN 3076-3078). This history makes it clear that the legislation was meant to extend to adult inmates the kind of authority which the Attorney General already had in Sections 4082, 5013, and 5039. This prior authority allowed the Attorney General to commit and transfer juveniles and youthful offenders to halfway houses operated under different plans, including halfway houses operated by Bureau of Prisons' personnel, by state Departments of Corrections, and by private organizations, including a private university. The legislative history states at page 3078, "It is contemplated that under the Bill's authority to use community centers for older types of prisoners a similar variety of organizational plans will be adopted."

Moreover, nothing in Section 4082 or its legislative history would restrict such contracts to private halfway houses. Section 4082(e) defines "facilities" to include residential treatment centers, and the statute, in referring to "facilities and institutions", should be interpreted to encompass traditional institutions in addition to residential treatment centers.

The fact that the Department is seeking specific authority to enter these contracts with private persons or agencies in next year's authorization bill does not argue against this conclusion. That authority is sought, at our suggestions, to make very clear that there is Congressional support for the contracting process.

Thus, we conclude that there is authority to contract with private facilities, both halfway houses and traditional prisons and detention facilities, based both on the legislative history to Section 4082, and on the need to read Section 4002 so as to make meaningful the language of Section 4082, which allows designation to non-federal facilities, including private facilities.

Mr. **KASTENMEIER**. The American Bar Association, speaking generally to the subject very recently, recommends a moratorium, a legislative moratorium, as a matter of fact, on privatization of entire institutions until complex issues are resolved either by the Congress or by the executive branch. Would you agree with that recommendation?

Mr. **CARLSON**. Mr. Chairman, I would have reservations about a total moratorium, particularly in the face of the extreme overcrowding we are confronting today.

As you know, the Federal prison population is now at 38,200, a 14,000-inmate increase in a little over 6 years. Given that sudden surge in population, I personally would like the flexibility to use privatization or private sector operations for lower security inmates.

Mr. **KASTENMEIER**. Can't you get into difficulties even with lower security inmates? We have this case in the Washington press in the last few days where 55 inmates were removed from the District jail, apparently because of the problem of overcrowding, and the Mayor, presumably consulting with the Justice Department, sent them up to Pennsylvania to a private institution. These were persons guilty of misdemeanors only.

Up in Pennsylvania they ran into problems. Apparently the Governor or others up there felt that the institution they were sent to had not been certified by that State, and, as a result, as I say, a real quagmire took place. They were supposed to be returned. The judge issued an order, and then we hear that the private company operating the facility, I think, has instituted bankruptcy proceedings, which is in line with one of the issues that you indicate are unresolved regarding contractor insolvency.

So is it not the case that even for misdemeanors, for minimum security types, you could run into a legal quagmire as a result of privatization to answer certain problems?

Mr. **CARLSON**. Mr. Chairman, first, as I am sure you understand, the District situation is not our responsibility.

Mr. **KASTENMEIER**. I understand that. I use it only as a corollary.

Mr. **CARLSON**. I think I think there are risks, and I certainly would not minimize those risks. On the other hand, I think that we ought to continue to explore that privatization for low security inmates. We use private control for halfway houses exclusively, and our experience to date has been generally satisfactory.

Mr. **KASTENMEIER**. Do you have any guidelines as to in what instances or in what situations or with respect to what inmate personnel would you employ this, and that which you would not?

Mr. **CARLSON**. We have never even considered going beyond the minimum security classification of inmates for private sector operations, and that is of course, a limited number of inmates who are serving very short sentences.

Mr. **KASTENMEIER**. You, yourself, indicate there are other issues, which apparently you have not had to yet confront but may have, which revolve around law enforcement functions, such as use of weapons in emergency situations, investigation and discipline of inmate misconduct, issues relating to labor actions, and we said insolvencies, strikes, and so forth.

You've not had to confront any of those issues yet, but you might as you even cautiously employ privatization plans. Is that correct?

Mr. **Carlson**. That is correct.

Mr. **Kastenmeier**. And you obviously correctly point out, it's very hard to compare privatization enterprises with normal prison incarceration, even in the minimum security field, because, in part, the per capita basis is somewhat different. The one case you did indicate was under the Youth Corrections Act. It was a rather expensive, relatively speaking, per capita cost at LaHonda—$92 a day.

On the whole, would you say that privatization is likely to, for comparable purposes, result in a higher per capita cost than traditional institutional costs?

Mr. **Carlson**. I do not think it will result in any reduction in per capita costs at any security level. The minimum security institutions that I have referenced operated at a cost comparable to a level 1 institution. I cannot go beyond that, because we do not have the experience, but I do not think we would see any cost savings in terms of privatization.

Mr. **Kastenmeier**. One final question. Then I'll yield to the gentleman from Massachusetts.

Whether you would like to or not, could you find yourself in the position of the District jail system and the Mayor? That is to say that your overcrowding, which is extant at Federal institutions, is such that because of judicial orders or otherwise you have to quickly move inmates to other facilities and in fact have to resort to private facilities to accord with, let's say, any orders that might be ultimately handed down? Could you find yourself in the same position as the District government in this respect?

Mr. **Carlson**. I suspect we could, given the population pressure we are under.

Mr. **Kastenmeier**. Thank you. I have other questions. I'll hold them till later.

I yield to the gentleman from Massachusetts.

Mr. **Frank**. Thank you.

I appreciate your approach, and I don't think this is one—it's certainly not one where I think there's an automatic, easy answer. But I do have some questions about some of the difficulties.

The assertion—I hadn't seen it before—that a private contractor could use a bankruptcy to affect the disposition of human beings who are incarcerated is obviously outrageous, but it raises—would there be agreement that whatever private facility we might use, everybody's rights would be the same?

It would seem to me that the starting point ought to be that no rights on either side ought to be lost, either in terms of authority for the personnel or rights of reasonable treatment of the inmates ought to be diminished. Would you agree that if there were going to be any diminution on either side, that would rule out the experiment?

Mr. **Carlson**. I agree with your statement, Congressman Frank.

Mr. **Frank**. So I would think that one of the things we would have to do would be to make sure that, again, on both sides, in terms of the authority that was given and the rights of prisoners—which means questions of State action and not State action—would have to be resolved. I would think that we would require of contractors, if it could be done, that they would waive any defenses they might try to raise on the grounds that they were not a public entity. If we're going to have the public catch people and turn them over for custody, then those who exercise that custody ought to be prepared to stand fully in the shoes of the public entity, and I'm glad to hear that, because I think that's essential.

Let me ask you a couple of other questions. One of the problems we're getting these days in a lot of private businesses has to do with liability insurance. The Federal Government is a self-insurer. What happens in these sorts of situations where a private contractor is running the jail? I'm not sure that I would want to have to pay the premiums that a private contractor would have to pay in today's climate if he was running a private jail.

Has there been any look into that? It seems to me that, given the experience of insurance premiums elsewhere, that, in and of itself, would be a cost factor that would be an add-on. What has been your experience with insurance on the facilities that you have used that have been private?

Mr. **Carlson**. The private sector firms indicate that this is not a significant problem. I tend to disagree. I do not think they really understand the degree with which inmates will sue for virtually anything, legitimate and or not.

Mr. **Frank**. The first major judgment that you get is likely to send things skyrocketing, and I'm afraid we could be in a position where we've got some—to the extent that we rely on people to do this as an alternative to building our own facilities—and maybe that's got some advantages, but I'd hate to see us get locked into where the lead time for us building some new facilities is so long and all of a sudden insurance premiums skyrocket, because I think you correctly anticipate what's going to happen.

What about training of personnel? Obviously a very sensitive area. You are giving these people control of other people's lives; you're giving them the right to use weapons. What are your approaches in terms of guaranteeing that the standards for personnel for the private contractors are at least as good as your own?

Mr. **Carlson**. It is difficult to ensure that, our contracts require that a level of staff training is provided that is comparable to what we provide Federal employees. The problem, however, is the recruitment aspect: Who are they recruiting and retaining in these positions? We have no control over that.

Mr. **Frank**. And you can't monitor the training. They certify that. But I would think, again, that would be a real problem. They come to you with this group of employees, and I have to tell you, in the private security guard area, while some security companies have very good records, there have been cases of private security guards who maybe didn't make it as a public peace officer, and you get into some problems. So, again, I think that's a very difficult problem, and I think these may be the kinds of things the ABA was talking about: How do you guarantee the very rigorous kind of standards that you try to provide for them?

Let me just ask one other question that was suggested to me by staff. In the—was it the Houston facility—is there an intermingling of people who have been convicted and INS detainees?

Mr. **Carlson**. No. They are kept separate.

Mr. **Frank**. They are kept totally separate. OK. There was some question. So they may be in the same facility, but there is a separation in terms of where they are.

Thank you.

Mr. **Carlson**. Once inmates have completed their sentences with us in the Houston facility, they are transferred over to the other part, operated by the Immigration Service.

Mr. **Frank**. The point, though, is that those people who were detained and had not been convicted might be intermingled according to INS policy with people who were postconviction detainees in any case.

Mr. **Carlson**. That is correct.

Mr. **Frank**. So that's a matter then for maybe INS to deal with. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. The gentleman from North Carolina.

Mr. **Coble**. Thank you, Mr. Chairman.

Mr. Carlson, thank you for being with us.

Has any litigation resulted from the Bureau's experience in contracting out facilities in Texas and California?

Mr. **Carlson**. Not to my knowledge with the Bureau. I believe the Immigration Service, however, has been subject to litigation on the Houston facility.

Mr. **Coble**. On the Houston facility.

On page 4 of your statement, Mr. Carlson, you indicated that these two experiences with privatization to date have been essentially positive. On the other side of that coin, have there been negative developments that you feel you might want to share with us?

Mr. **Carlson**. Yes. The cost aspect is probably the primary negative we encountered. LaHonda, in particular, was a very expensive operation, partly because of the size, only 60 inmates, which drove the cost up.

We had no complaints from the inmates. The Federal judges who toured the facility reacted positively also.

In the Houston facility, there have been concerns raised about the manner in which the aliens are being treated. We are looking into those concerns, to ensure that the inmates are treated humanely, in the same manner they would be if they were incarcerated in one of our regular Bureau of Prisons facilities.

Mr. **Coble**. On the final page of your statement, you indicate that you all will continue to pursue contracts in these and other kinds of lower security situations. Are there any contracts in the works now that we might want to follow?

Mr. **Carlson**. No, there are none.

The chairman, in his earlier statement, referred to a facility in Mineral Wells, TX. As I believe the committee knows, we did consider that for minimum security alien offenders, but it was dropped when a tremendous amount of community opposition developed, much like the experience recently with the State of Pennsylvania. The local citizens did not want this private sector firm operating within the city limits of Mineral Wells, and as a result of that opposition we decided not to contract with the corporation.

Mr. **Coble**. I have no further questions, Mr. Chairman. Thank you.

Mr. **Kastenmeier**. Let me go back to a general question but I think as a background it may be useful here. We had, as you know, a hearing on the Justice Department budget last week. The Attorney General presented the budget of the Justice Department with a very sizable increase, I personally was very pleased to see, for the Bureau of Prisons.

Regrettably, the Attorney General was not able to be very specific about what this was all about. He referred to about three areas which would be new facilities. He referred an increase of 250 beds at another facility, if you read his statement. More than that, he could not tell me when I asked him—perhaps understandably—really what was the net increase in Federal beds for the Bureau of Prisons that we could contemplate in this new budget request, if approved.

I thought probably, Mr. Carlson, you might have a better idea precisely of what increase—because of overcrowding, I asked this question—what increase we could assume would take place as a result of the capital improvements contemplated by the 1987 budget request.

Mr. **Carlson**. Mr. Chairman, the budget request now pending before the Appropriations Committee is the largest construction budget in the history of the Bureau of Prisons, $134 million for new institution construction. That would build three new institutions, one in Bradford, PA; one in Sheridan, OR; and another in Marianna, FL.

In addition, the funds would construct a camp at our new institution at Phoenix, AZ, and expand the camp at Marion, IL. These are minimum security camps outside of traditional institutions.

The combined capacity of these facilities will be about 2,500 inmates, single bunk. With all probability they will house 3,000 inmates once they are completed.

Mr. **Kastenmeier**. Well, that's helpful, and obviously this will be a significant step in meeting the overcrowding situation in the Federal system if, indeed, the commitments to your system are not continually on the increase, as they have been. I think you're in—what?—the 38,000 level.

Mr. **Carlson**. 38,200.

Mr. **Kastenmeier**. And you had been down to 23,000 or 24,000 about 5 or 6 years ago. So this very fast buildup has certainly caused enormous problems, and you still have these problems. The fact that you have had to take a good deal more in the way of INS detainees into the Federal Prison System for per capita daily maintenance for unspecified periods of times adds another burden in terms of your population.

I'm not sure whether the 2,500 or the 3,000 beds, once completed and occupied—you probably won't be then current, will you?

Mr. **Carlson**. The 3,000 beds will reduce our level of overcrowding to 35 percent, versus about 45 percent today. It will make a dent in the problem, but it will not resolve the overcrowding issue.

Mr. **Kastenmeier**. The gentleman from Massachusetts.

Mr. **Frank**. I didn't mean to interrupt. If you have finished, I just have a few more questions.

Mr. **Kastenmeier**. Oh, no.

I'd like to solicit your comment. This is a question asked of one of our witnesses who was an exponent of privatization the last hearing, and I asked that witness whether he'd be prepared to take over Marion, IL, if necessary, if that were in the scheme of things and we were really going to be serious about this, because this is not unthinkable. After all, they [CCA] proposed to take over the entire prison system in the State of Tennessee, as you know, maximum security and all, I believe. He said, "Oh, yes; oh, sure. That would be a great challenge."

Having said that, I know you have no plans, even though you might like to, to turn Marion Penitentiary over to anyone else, but seriously, isn't that unthinkable?

Mr. **Carlson**. From a selfish standpoint, as you indicated, it would be a relief to get rid of the problems we have in Marion. But, no, I think it is totally unthinkable for anyone to assume that the private sector is at the point today where they could take over and operate such a complex facility, which is the ultimate sanction in the Federal criminal justice system. I think it is rather absurd to make such a statement.

Perhaps in 10 or 20 years we will be in that position, but we certainly are not today, in my opinion.

Mr. **Kastenmeier**. You have a couple of mixed facilities. You only had a couple of experiences, but they have not been—either because of the type of inmates or because of the limited numbers and nature of the facilities—they did not involve, I take it, escapes, or use of force, or charges of abuse with respect to those persons incarcerated under the Youth Corrections Act, or whatever, in terms of those being operated either in California or Texas by private means. They did not confront those problems?

Mr. **Carlson**. That is correct, Mr. Chairman. No weapons were permitted in the facilities. The type of inmates assigned to those institutions are not violent or dangerous. We believe they can be handled in very low security environments.

Mr. **Kastenmeier**. I'd like to yield again to the gentleman from Massachusetts.

Mr. **Frank**. I thank the chairman.

What about the right to strike? I would suspect in some situations private individuals would have a statutory right to bargain collectively. They have private employers. I don't see anything on our books that would allow you to preempt a statutory right under the National Labor Relations Act. So wouldn't anybody who has a contract with you—wouldn't their employees, if they so chose, have a legal right to strike which you could not interfere with?

Mr. **Carlson**. As I understand it, they would have. I think that is a very serious issue that has to be confronted in dealing with the private sector.

Mr. **Frank**. And it seems to me one of the complicating factors to talk about. I think we would all be reluctant to be granting Federal agencies the right to suspend collective bargaining rights under the National Labor Relations Act to contractors.

What about competitive bidding laws? Would we have a situation where people might be submitting bids—you know, "I'll take 50 felons at $40 a day"? Would you be governed by the competitive bidding laws?

Mr. **Carlson**. Yes, we are now.

Mr. **Frank**. So private contractors would be able then, absent some—if we just go on the statutory authorization they are relying on in title XXVIII, I think it is, and nothing else, private contractors could bid. You could set the geographic location, but as long as they were within the geographic location, you'd have to go with the lowest qualified bidder?

Mr. **Carlson**. If we decided to contract, that is right.

Mr. **Frank**. Even if that interpretation is correct—and I see nothing to dispute it—I'm not sure that was the intent of the framers; under the Meese doctrine maybe that would carry.

On the statutory authority we've got here, it would seem to me no one would really want to use that for any significant degree of contracting out, because you would want some other statutory protections, I would assume, in terms of some of the things we've talked about—that that would give you the legal authority, at a minimum perhaps, to do it. It wouldn't give you the statutory authority to do it in the way that I think you as a responsible official would want to see it done.

Mr. **Carlson**. That is correct, sir.

Mr. **Frank**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. May I say, I don't know whether you really come with much enthusiasm for privatization or not. I think there may be more enthusiasm in other quarters in the executive branch.

I say that for a couple of reasons. Your principal argument for privatization in the Federal system is flexibility. I think that's the one and only term you've used that suggests a reason for it. Yet to date its infrequent use—that is, really only two contracts that have been actually executed—suggest that, more than just being cautious, you really have not found, other than for purposes of flexibility, any great advantage in the Federal Bureau of Prisons resorting to privatization. Is that not correct?

Mr. **Carlson**. I would agree with your statement, Mr. Chairman.

Mr. **Kastenmeier**. I would say there are a couple of problems. One is, in the sense that State systems go private, there will be pressure, perhaps, on you to emulate State systems in going private.

You will have also, I think, problems, modest at first, in the morale of your Bureau of Prisons personnel who will feel threatened in terms of their jobs as careerists in corrections if they think that you're increasingly going to resort to persons on the outside; there would be a lessening demand for their services, and devotion to corrections as a career on their part, I would think, would pose a problem if you moved too quickly in that direction.

Mr. **Carlson**. I agree with your concerns. They are very legitimate on the part of our staff.

Mr. **Kastenmeier**. One of the concerns I have is that some—I hate to use the term "bureaucrats"—some people in planning how one dedicates resources, as they did in the postal system, will conclude that we need not own our post offices any more, we can rent them, or we can allow services, premium services, to be offered by private organizations and so forth; that this sort of attrition in terms of your function could, as a matter of policy, take place. I'm not sure that it would be very beneficial to what the Bureau of Prisons stands for.

You did, I think, suggest such people contemplating such a move ought to consider how the Bureau of Prisons—how the corrections function is different in our society than other Government services, per se, including the constitutional and other questions in terms of custody of inmates that far exceed the problems that other Government service organizations have been traditionally involved in.

I, frankly, have no further questions, other than to encourage your caution with respect to this. At this point, I don't know that we need to write additional statutory language in terms of authorization or anything else purely with the sort of minimum interest the Federal Bureau of Prisons has at the moment. Probably it's not necessary. I suspect a clear superficial reading of the law does give you authority in terms of what you are now doing, as it does relate to operating halfway houses, and contracting out, and so forth.

But we would certainly desire to be consulted about possible changes in the event the Bureau of Prisons decided to move more fully into privatization.

Mr. CARLSON. I assure you we will consult with the committee, sir.

Mr. KASTENMEIER. Thank you very much for your testimony today.

Mr. CARLSON. Thank you, Mr. Chairman.

Mr. KASTENMEIER. And we again congratulate you, Mr. Quinlan.

Mr. QUINLAN. Thank you, Mr. Chairman

Mr. KASTENMEIER. Next the Chair would like to call Mr. Dave Kelley, who is president of the Council of Prison Locals, American Federation of Government Employees, AFL/CIO.

Mr. Kelley.

Mr. KELLEY. Mr. Chairman, with your concurrence, I'd like to introduce Robert Egdell; he's with the AFGE staff, a Government procurement specialist; and Mr. Cliff Steenhoff, a legislative representative of the Council of Prison Locals.

Mr. KASTENMEIER. Thank you for introducing your colleagues. You are all most welcome, and you may proceed as you wish, Mr. Kelley.

STATEMENT OF DAVE KELLEY, PRESIDENT, COUNCIL OF PRISON LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ACCOMPANIED BY CLIFFORD STEENHOFF, VICE PRESIDENT AND LEGISLATIVE REPRESENTATIVE, COUNCIL OF PRISON LOCALS; AND ROBERT EGDELL, CONTRACTING SPECIALIST, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. KELLEY. Thank you.

My name is Dave Kelley. I'm the president of the American Federation of Government Employees, National Council of the Bureau of Prison Locals. We are the exclusive representatives of all Federal employees in the Bureau of Prisons I am pleased to have this opportunity to testify before this committee on the privatization of prisons.

Before looking at the legal, practical, and economic concerns surrounding the issue of "prisons for profit," I would like to bring out some broader philosophical and ethical questions.

Our Declaration of Independence declares that there are "certain unalienable rights, that among these are life, liberty, and the pursuit of happiness—that to secure these rights, governments are instituted among men." The Government, and only the Government, can deny individuals these rights, and only to protect these rights for the majority.

Since the Civil War, we have not given any other institution the legal authority to deny these fundamental rights from individuals. These individual rights in our society are so profound and so sacred that we only allow them to be abridged in a carefully structured criminal justice system imbued within, indeed, identical to, the Government.

When societies moved from justice based on might and individual revenge to justice based on law and government, it was a giant step forward for civilization. Steps in the opposite direction should not be taken lightly.

Remember, unlike other governmental functions, prisons don't do things for people, they do things to people. They deny criminals the essence of society, freedom. These acts cannot, and should not, be trivialized. They cannot, should not, be sold to the highest bidder like lawn furniture before the first snow.

Government has been defined as legitimized force. In the prison, this force is always felt, if not seen. Does the Government become less legitimate, less worthy of the citizenry, when it delegates this force to the lowest bidder? We think yes.

What we are talking about is punishment for profit. We have not examined the annual reports from the Corrections Corporation of America (CCA), but perhaps they even report their profit as a rate of return per criminal.

My members work in these institutions. We have seen a dramatic increase in the inmate population. We are sure that CCA is able to report to its shareholders that business is good and the future looks promising. But we are equally sure that if their industry takes a down turn, they, like every other business, will turn to the legislature to keep them in business. Their profit is directly linked to a constant and increasing supply of incarcerated prisoners. For the first time, it is in someone's self-interest to foster and encourage incarceration. It does not take an accountant to figure out that they will act in their self-interest.

Finally, if the committee decides that the function of punishment is an appropriate realm for the profit incentive, we hope that the committee has the courage of its convictions. We hope that it recommends to the States to privatize all the punishment functions. We have not seen a cost estimate on the death penalty. But whatever it costs, we know some individuals—"entrepreneurs"—who would do it for less. We see them every day in cell blocks across the country.

It is on these fundamental concerns that we think this committee should halt all consideration of the privatization of prisons.

On a more practical level, there are other concerns. Once a prison is built, about two-thirds of the cost of running a prison is personnel costs. If the Rent-a-Guard Corp. is going to make a profit and cut costs, it is going to do so by cutting personnel costs. Fewer correctional officers mean more escapes, more inmate attacks, and more riots.

Given the stress inherent in working in prisons, longer correctional careers mean more heart attacks, more alcoholism, more nervous breakdowns—in short, more death. Lower salaries mean greater turnover, less qualified personnel, less job commitment, and, in many cases, exploited workers.

Do not be fooled or deluded by high sounding tributes to efficiency and economies of scale. As the companies cut corners to bolster the bottom line, law and morality will fall by the wayside for inmates and employees alike.

There is a complex set of legal issues which is also involved. Companies would appear to be liable for misconduct but would be ineligible for protections derived from statutes and common law doctrines that preclude or limit the liability of public bodies. Insurance for private corporations and their employees will be incredibly expensive, and ultimate financial responsibility will still be with the Government (see for example, *Medina* v. *INS*).

In addition, the private sector companies often bemoan the problems of unionization. But there are private sector companies with, not surprisingly, private sector employees. Private sector employees cannot be legally prevented from organizing and bargaining with management. (The National Labor Relations Board has just ruled that the contractor of the Iowa State Prison medical care is subject to their rules and has ordered an election for representation). Equally certain, as private employees, they cannot be prevented from conducting strikes and other work stoppages. Will public employees then be called on as strikebreakers?

We also note that the private sector companies often are proposing a sort of skimming operation where they take only the less dangerous and less violent of inmates. This, by necessity, will require housing the worst inmates in fewer institutions, increasing the costs of running these remaining institutions.

Along similar lines, what happens when one of those private correctional corporations goes broke? Does the Government renegotiate? Who picks up the bills? Can the prison be smoothly transferred to the public or another company?

The Bureau of Prisons has already had to cover for a contractor providing medical care at the Metropolitan Correctional Center in Chicago, short-staffing other institutions to do so. With entire prisons in private hands, problems will not be so easily covered.

Finally comes the issue of contract monitoring. We are not talking about a once a month visit. The level of monitoring would necessarily be extensive and continuous. We suspect that the monitoring costs are not included by the privatization advocates.

We urge this committee to oppose privatization of Federal prisons.

Related to the privatization issue is the contracting out of Government jobs within the institutions.

The Bureau of Prisons is currently contracting out medical activities at MCC, Chicago, food service at the Federal Detention Center in Oakdale, and educational services to some degree at all institutions. [illegible] has just dropped the contract for food service at the F.C.I. Duluth.)

Contractors have used inmate labor at Duluth for food service and are currently using it at Oakdale without paying the minimum wage, in violation of the Fair Labor Standards Act. The Bureau of Prisons has adopted the position that these inmates are receiving on-the-job training. But what skills are needed to wipe tables, mop floors, wash garbage cans, and clean pots and pans is unclear to us. Granted, one or two inmates might learn some butchering or baking, but not to become a butcher or a baker.

The contracting of specific operations within a secure institution has appeal because the Bureau of Prisons has more salary and expense funds than it does man-years because of personnel ceilings.

Contract employees are not employees of the Bureau of Prisons and, as such, must be escorted in and out, and they require that a BOP staff member be in the area at all times. Hence, this increases the workload on BOP staff. Now they not only have to watch the inmates but they also have to watch the contract employees.

I thank you, Mr. Chairman.

Mr. **Kastenmeier**. Thank you, Mr. Kelley.

The Director of the Bureau of Prisons, Mr. Carlson, testified that there are really three categories of privatization. He said the first category is facilities that are leased. The first category is just the leasing of facilities, including lease-back arrangement, rather than the capital construction of facilities as a form of privatization.

The second area he referred to were private contracting for halfway houses and also to a series of ancillary services, contracting for selected services—education, food service, medical, and other services—within a government-owned and operated facility. Then third, of course—and that's what we're talking about here—referring to the management and operation of facilities by the private sector.

In your brief discussion, you have been, in part—at least at the end you devoted yourself to really the second area, the contracting out of ancillary services. But hasn't this been going on for a long time in selected circumstances—the contracting out of ancillary services such as food services, depending on the institution or facility?

Mr. **Kelley**. For medical, as I recall, it started in 1982 up in Chicago; they contracted out the medical services and had some problems with that. Food service is fairly new. They had one in Duluth; they've got one in Oakdale—just last year in Oakdale; it just opened up there recently; and they just opened up down in Louisiana.

Mr. **Kastenmeier**. I don't know that I understand completely what it is that you object to about the food services being contracted out in certain cases?

Mr. **Kelley**. The part we are concerned about, of course, with any contract employee inside a facility, along with a Federal employee—Bureau of Prisons employees—it puts another responsibility on employees. There's a policy that no contract employee can be out of sight of an employee of the Bureau of Prisons. So now you not only have the inmates to watch, which is the primary responsibility; now you have to also watch the safety of the contract employees, like our education services; they do that quite a bit.

Mr. Kastenmeier. I would have concluded that these are not the very large institutions, and also these are institutions in which most of the food personnel are inmates themselves; at least, that has been traditionally the case. So you would have a relatively small number, I assume, of contract personnel in the facility at any time in terms of food services, would you not?

Mr. Kelley. I'm not familiar with the activities of the food service. Like in Duluth, I think it since has been dissolved, and we're back in the institutional level. The Oakdale is just now starting. I'm not too familiar with the ramifications of that.

As I undertand, the contract employees are not allowed to supervise the inmates; that must be done by a staff member. They're there to function as leaders in the food service and preparation. Of course, we have staff members supervising the inmates.

Mr. Kastenmeier. But isn't that question a much smaller question than the privatization of entire facilities, as is contemplated certainly in the State systems here and there?

Mr. Kelley. Yes, sir.

Mr. Kastenmeier. And while there's only a start here in the Federal system, to the extent that there is support for it, at least at certain levels in the executive branch, you may be confronted with even more of it down the line.

What is it you would like to see? Would you like to see a legislative or an executive moratorium on the system of privatization? Or what are you suggesting?

Mr. Kelley. Yes, sir, we would like to see a moratorium on the contracting out or privatization of prisons, at least until cost comparisons and the complex legal activities are addressed and we know more about what the ramifications are of those things.

Mr. Kastenmeier. Have you or your colleagues been able to determine or form a judgment about the Bureau's experience in contracting out facilities in Houston or in LaHonda, CA?

Mr. Kelley. No, sir, I'm not. Houston belongs to INS. I talked to the INS president of the council, and he couldn't give me any input into the activities down there. I'm not familiar with that facility at all.

Mr. Kastenmeier. I don't know whether you'r familiar with the current matter in the papers involving the assigning of 55 inmates from District jail to a private facility in Pennsylvania. This arrangement has been running into problems and even now involving the facility has resorted to bankruptcy protection, I gather, as a tactical device for the purpose of preventing court action in requiring certain actions by the contractor.

Do you have any comment on that particular situation? I guess the District jail people are not your people.

Mr. Kelley. No, sir, they are not. Listening to the news this morning, it sounds just typical of the problems that occur when the private sector is allowed to carry out Government functions. It's not one of our facilities.

Mr. Kastenmeier. You indicated that it would be your surmise that the private sector organizations would naturally try to profit and, to do so, would have to cut personnel costs. Yet Mr. Crane of the Corrections Corporation of America said that they had, in fact, increased the salaries of staff when they privatized the facility in

Florida. They would pay overtime for work over 8 hours, and so forth, and so on. He went on to suggest some other personnel advantages in working for them. So are we really sure that this would be adverse to personnel, working for a private entity?

Mr. **Kelley**. I'm not quite sure what they increased their salaries to. For the State in Florida, it's starts out at $15,600; for the Federal, it's $16,000. So the State of Florida corrections facilities system pay is much lower than the Federal system. So I don't know what they increased it to, Mr. Chairman.

Mr. **Kastenmeier**. In any event, you are not concerned with whether State or other facilities, other than Federal facilities, are privatized; you're only concerned about the Federal sector?

Mr. **Kelley**. That's all I can speak for, the Federal. My personal feelings about it wouldn't—that's all I can speak for.

Mr. **Kastenmeier**. Even though you might feel that the privatization of State facilities represents a poor policy direction in terms of being ultimately followed by the Federal Government?

Mr. **Kelley**. That's the concern; yes, sir.

Mr. **Kastenmeier**. Is it your position or that of the union that all contracting out by the Bureau of Prisons, whether for ancillary services or indeed an entire institution, should be preceded by a cost comparison study pursuant to OMB Circular A-76? Is that presently being done?

Mr. **Kelley**. Not to my knowledge, sir. But definitely it would be our position.

Mr. **Kastenmeier**. Incidentally, going back to Mr. Crane, he also suggested that they intended to require 360 hours of basic training for their employees, not just the 120 hours required by the American Correctional Association standards. I don't know how this compares to current basic training on the part of the Bureau of Prisons, but that really surprises us, that they would have required so much.

Mr. **Kelley**. The Bureau of Prisons has about 200 hours. We have 2 weeks on site, and we have 3 weeks in an academy setting, for a total of 300. Of course I can't speak to the quality of the training that the organization gives.

Mr. **Kastenmeier**. Would you not agree that the Federal Bureau of Prisons has proceeded very cautiously with respect to this privatization boom, that in experimenting really only with two or three instances—we're talking about essentially whole institutions or major parts of institutions, not merely ancillary services—that they have done relatively little, and that you have not objected thus far to what they have done, or have you? I don't know what your position is with respect to LaHonda and Houston.

Mr. **Kelley**. No, sir; I think Mr. Carlson shares our concerns. He has been very cautious, and we appreciate that.

Mr. **Kastenmeier**. Well, I want to thank you for your appearance today. I don't know whether the subcommittee will take statutory action. I suspect perhaps not. But I do assure you that we are pleased to have your views. Indeed, they are probably somewhat similar to the sheriffs' association views that we received the last time. They are no more enthusiastic in the State and local prisons and jails sector than you are in the Federal area.

If there are further developments with respect to this, we would obviously be most pleased to hear from you.

Mr. **Kelley**. We appreciate that.

Mr. **Kastenmeier**. We expect to monitor so-called privatization functions, and I suspect you will as well. If you are finding things occurring which you take exception to, we would appreciate your contacting us.

Mr. **Kelley**. We will, sir. Thank you.

Mr. **Kastenmeier**. Thank you, Mr. Kelley and your colleagues.

This concludes today's hearing on privatization of prisons in the Federal system today, and until the committee announces any further hearings we stand adjourned.

[Whereupon, at 2:40 p.m., the subcommittee was adjourned.]

Editor's note.—Four excellent government documents on the subject of private sector involvement may be available through the U.S. Department of Justice (including the National Institute of Justice and the National Institute of Corrections) or the National Criminal Justice Reference Service.

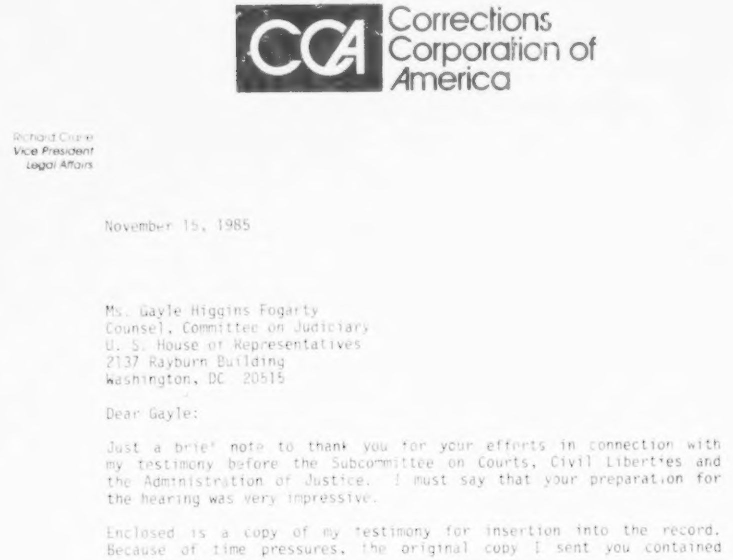
1. Camille G. Camp and George M. Camp, "Private Sector Involvement," (Criminal Justice Institute for the National Institute of Corrections) February 1984.

2. Joan Mullen, Kent John Chabotar, Deborah M. Carrow, and others, "The Privatization of Corrections," (Abt Associates for the National Institute of Justice) February 1985.

3. Joan Mullen, "Corrections and the Private Sector," (Research in Brief prepared for the National Institute of Justice) March 1985.

4. George E. Sexton, Franklin C. Farrow, and Barbara Auerbach, "The Private Sector and Prison Industries," (Criminal Justice Associates for the National Institute of Justice) August 1985.

APPENDIX



Corrections Corporation of America

Richard Crane
Vice President
Legal Affairs

November 15, 1985

Ms. Gayle Higgins Fogarty
Counsel, Committee on Judiciary
U. S. House of Representatives
2137 Rayburn Building
Washington, DC 20515

Dear Gayle:

Just a brief note to thank you for your efforts in connection with my testimony before the Subcommittee on Courts, Civil Liberties and the Administration of Justice. I must say that your preparation for the hearing was very impressive.

Enclosed is a copy of my testimony for insertion into the record. Because of time pressures, the original copy I sent you contained a couple of typos.

I am also enclosing statistics on escapes from CCA - Silverdale which is the workhouse for Hamilton County, Tennessee. It is located in Chattanooga. Lastly, I am sending you a copy of our Executive Summary as we discussed

If I can be of additional help to you or the Committee, please don't hesitate to give me a call.

Sincerely,

Richard Crane

RC/bb

Encls.

23 WHITE BRIDGE ROAD SUITE 206 • NASHVILLE TENNESSEE 37205 • (615) 356-1885

ESCAPE COMPARISONS

HAMILTON COUNTY, TENNESSEE WORKHOUSE

JANUARY 1, 1984 - NOVEMBER 14, 1984

WHEN COUNTY OPERATED FACILITY:

32 Escapes

10 From Facility

22 From Workcrews Under Supervision of Sheriff

NOTE: 1984 - They All Got Away

JANUARY 1, 1985 - NOVENBER 14, 1985

WHEN CCA OPERATES FACILITY:

37 Escapes

9 From Facility

28 From Road Crews Under Supervision of Sheriff

NOTE: Of Nine Escapes from Facility - 5 Were Recaptured Within the hour

U.S. Department of Justice

Federal Bureau of Prisons

[illegible]　　[illegible]

November 6, 1985

Ms. Gail H. Fogarty
Counsel
House Judiciary Committee
Rayburn House Office Building
Room 2137
Washington, D. C. 20515

Dear Gail:

This is in follow-up to your call, Friday, concerning Privatization. You asked if the Director or our General Counsel have published our position on this issue.

The attached paper, "Privatization in Federal Corrections," was recently prepared by one of our staff. It may be helpful in understanding our experience with private sector contracts.

If I can provide additional assistance, please contact me.

Sincerely,

Patricia K. Sledge
Executive Assistant
to the Director

Enclosure

PRIVATIZATION IN FEDERAL CORRECTIONS

Contracting for correctional services is not a new concept. The Bureau of Prisons has for many years contracted with the private sector for designated correctional services. In 1961, the Bureau began what is now known as the Community Treatment Center program. Under this program, inmates who are near their release dates are placed in the community for the last 3-4 months of their sentences. All inmates placed in this program are carefully screened by Bureau staff to insure the continued integrity of the program and the safety of the community. By the early 70's the Bureau came to rely heavily on contract CTCs for placement of Federal offenders. These were supplemented with nine Federally operated CTCs.

In 1981, the Federal Community Treatment Centers, or halfway houses, were closed and we have since relied solely on contract CTCs. We presently contract with 330 Community Treatment Centers, 234 of which are privately run. Over 3,000 Federal inmates are currently in these CTCs. In Fiscal Year 1985, the average daily per capita cost was just over $29. The total expenditures for contract CTCs in Fiscal Year 1985 was over $29 million. In 1984, approximately 80 percent of offenders who were serving sentences of over six months and who were released to the community were released through contract CTCs.

. Overall, the Bureau has not experienced any more problems with its private contract facilities than with its government run facilities. Few of these facilities, however, have been secure facilities. Until recently, the Bureau's only experience with secure private contract facilities has been with long term juvenile facilities.

In August of 1984, the Bureau began a three year contract with a private-sector facility in LaHonda, California. This facility currently houses approximately 60 Youth Corrections Act offenders with low security needs. Prior to the YCA conversion, the facility was a contract institution for Federal juvenile offenders. The facility is being carefully monitored by Bureau staff and an inspection was completed in February. While some important issues have been raised, overall the contractor is performing very well.

The repeal of the Youth Corrections Act in 1984 will have the effect of reducing and eventually eliminating the Bureau's YCA population. Contracting to house these offenders at this time gives us the flexibility to house our present population without acquiring additional permanent space. This will allow us to respond to the predicted YCA population reduction in the most cost-effective way.

At this point in time, the LaHonda contract experience has raised many issues but has yet provided sufficient information to properly access the benefits and liabilities of private sector involvement in corrections.

The Bureau has also had experience in contracting for selected services in the areas of education, food service, medical and psychology services, and some consultant and service contracts in Federal Prison Industries. Our experience with these various contracts has been mixed.

In education/recreation, approximately one-third of the services offered in a year are done through contracts. We have however, been experiencing escalating prices for these services in recent years.

And while contract services provide a great deal of flexibility, contract staff cannot provide the auxilliary services required of full-time staff, such as serving as duty officer or serving on disciplinary hearing committees. In addition, each contract staff member normally must be escorted and supervised by full-time staff while in all institutions. Nevertheless, we are committed to expanding the use of private contract services where they best meet our educational, recreational, and vocational training needs.

BEST COPY AVAILABLE

Our experience in other areas of contract services has been more limited. In Fiscal Year 1983 we contracted with a private company for off-site food preparation service at FPC Duluth. A food preference survey was done by the Office of Research, and the food was found to be very comparable to the food prepared by Bureau staff. However, the second year bids for the contract were much higher than Bureau food service costs and the contract was not renewed. We are currently seeking a private contractor for in-house food preparation for our planned facility at Oakdale, Louisiana.

The Bureau is also currently contracting for medical services with a private health care provider at two institutions (FPC Duluth and MCC Chicago). We are still in the evaluation phase but several problems with the cost and the quality of service have arisen at Duluth, and a lack of continuity due to high turnover has developed at Chicago.

The decision to contract for medical services at these locations was based on the Bureau's difficulty in staffing them. The Federal Prison Camp, Duluth is in a remote area and it is difficult to get physicians to transfer there. MCC Chicago, while in an urban location, has experienced high turnover and staffing difficulties. At the present time, it is too early to tell if we will expand the use of private contract medical services.

These limited contracts have been a very useful way to obtain specific services without re-training existing staff or hiring new, permanent staff members. However, contracting out an entire secure adult facility, while not without precedent, should be very carefully considered.

Prisons are difficult and expensive to operate. Major costs are associated with the extraordinary security features which are needed. The Bureau of Prisons groups institutions into six security levels. An institution's security level is based on the type of perimeter security, the number of towers, external patrols, detection devices, the security of housing areas, the type of living quarters, and the level of staffing. Institutions labeled "Security Level One" provide the least restrictive environment and "Security Level Six" the most secure. Operation costs are directly related to the level of security provided. Where the private sector has claimed lower costs, the comparisons have generally not been accurate. Comparing the per capita cost of a minimum security private sector facility to the per capita of a public correction system that include maximum security facilities is not valid.

At the present, all of the Bureau's private sector experience has been in non-secure and low security settings. In addition, the facilities have been small and the residents have generally not been hard-core or management problems.

Whether prisons should be public trust administered in the name of justice or a private sector enterprise to be administered for profit remains open to question. The question, "Can the private sector successfully maintain a large, high custody facility?" remains to be answered. While the Bureau believes that the private sector can make a contribution to corrections, the extent of that contribution is not yet clear.

○